

Insurance Counsel Journal

January, 1942

Vol. IX

No. 1

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Issued Quarterly by

International Association of Insurance Counsel

Massey Building :: Birmingham, Alabama

Entered as Second Class Mail Matter at the Post Office at Birmingham, Alabama

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1941-1942

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President's Page

OUR national emergency affects the thinking and the activities of the members of our group quite as other groups, and from now until the end in victory the members of this Association should hold themselves in readiness first to serve the nation for the common good.

However, we must remember that it is to the advantage of the country as a whole to have as little disruption as possible in the routine work of the nation. It is with a full realization of the part that we as lawyers must play in the immediate future that I am calling your attention to the publication in this issue of the committees for the current year.

Each of you will please examine the lists and see where you have been assigned and then perform such services as you may be called upon by the chairman of your committee. I am hopeful that our work this year will mean much to the Association and its membership and the objectives to which we direct our energies. I am confident that I can count on your enthusiastic support.

I have found, as have other presidents, difficulties in the making of committee assignments and the getting of committee work started. I believe that at the next convention we should consider methods for securing more prompt appointment and functioning of committees.

Our activities as individuals and as practitioners of law during this period must be made responsive and subordinate to the efforts of the nation to preserve first of all our heritage of freedom and our hope for the future.

With the wish that each of you may have a successful year in spite of the troublous times that lie ahead, I am

Sincerely,

WILLIS SMITH,
President.

Insurance Counsel Journal

PUBLISHED QUARTERLY BY
INTERNATIONAL ASSOCIATION OF
INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor and Manager*
MASSEY BUILDING,
BIRMINGHAM, ALABAMA.

The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

Subscription price to members \$2.00 a year. To individuals not members \$4.00 a year. Single copy \$1.00.

Entered as Second Class Mail Matter at
the Post Office at Birmingham, Alabama

VOL. IX JANUARY, 1942 No. 1

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Chairman: Alfred C. Kammer, Hibernia Bank Building, New Orleans.
Alvin R. Christovich, American Bank Building, New Orleans.
L. W. Brooks, P. O. Box 2070, Baton Rouge.

MAINE

Chairman: Edward F. Merrill, Merrill Block, Showhagan.

Clement F. Robinson, 85 Exchange Street, Portland.

Herbert E. Locke, Depositors Trust Building, Augusta.

MARYLAND

Chairman: Milton A. Albert, New Amsterdam Casualty Co., 227 St. Paul Street, Baltimore.

Charles H. McComas, Bel Air.

John A. Luhn, Fidelity & Deposit Co. of Md., Baltimore.

MASSACHUSETTS

Chairman: Richard H. Field, 15 State Street, Boston.

Charles W. Proctor, 390 Main Street, Worcester.

Gurdon W. Gordon, Vice President & Legal Adviser, Monarch Life Insurance Co., 31 Elm Street, Springfield.

MICHIGAN

Chairman: Ari M. BeGole, Ford Building, Detroit.

Denis McGinn, 1103 Ludington Street, Escanaba.

Alexis J. Rogoski, Hackley Union Bank Building, Muskegon.

MINNESOTA

Chairman: E. A. Roberts, The Minnesota Mutual Life Insurance Co., 156 E. Sixth Street, St. Paul.

William H. Freeman, Northwestern Bank Building, Minneapolis.

Rollo F. Hunt, Lonsdale Building, Duluth.

MISSISSIPPI

Chairman: C. B. Snow, Deposit Guaranty Bank Building, Jackson.

J. Morgan Stevens, Jr., Standard Life Building, Jackson.

Ed. C. Brewer, Box 306, Clarksdale.

MISSOURI

Chairman: Rupert G. Morse, Employers Reinsurance Corp., Insurance Exchange Building, Kansas City.

Paul C. Sprinkle, Dierks Building, Kansas City.

Robert E. Seiler, Joplin National Bank Building, Joplin.

MONTANA

Chairman: Raymond Hildebrand, Glendive.

Robert D. Corette, Hennessy Building, Butte.

Roy H. Glover, First National Bank Building, Great Falls.

NEBRASKA

Chairman: John L. Barton, First National Bank Building, Omaha.

Don W. Stewart, Sharp Building, Lincoln.

G. L. DeLacy, City National Bank Building, Omaha.

NEVADA

Chairman: Miles N. Pike, P. O. Box 2465, Reno.

NEW HAMPSHIRE

Chairman: Philip H. Faulkner, 5 St. James Street, Keene.

Louis E. Wyman, 45 Market Street, Manchester.

NEW JERSEY

Chairman: John J. Francis, 1172 Raymond Boulevard, Newark.

Frank T. Lloyd, Jr., 4th & Market Streets, Camden.

Lionel P. Kristeller, 744 Broad Street, Newark.

NEW MEXICO

Chairman: Pearce C. Rodey, Box 422, Albuquerque.

Carl H. Gilbert, A. B. Renehan Building, Santa Fe.

NEW YORK

Chairman: Ernest W. Fields, Asst. G. C., U. S. Guarantee Co., 90 John Street, New York City.

Melvin H. Zurett, Reynolds Arcade Building, Rochester.

Joseph B. Murphy, State Tower Building, Syracuse.

Milton L. Baier, Merchants Mutual Casualty Co., 268 Main Street, Buffalo.

Donald Gallagher, 11 North Pearl Street, Albany.

NORTH CAROLINA

Chairman: Robert H. Sykes, Geer Building, Durham.

Robert R. Williams, Jackson Building, Asheville.

Frank H. Kennedy, Law Building, Charlotte.

NORTH DAKOTA

Chairman: Herbert G. Nilles, New Black Building, Fargo.

Gordon V. Cox, Little Building, Bismarck.

Philip R. Bangs, 215½ S. Third Street, Grand Forks.

OHIO

Chairman: H. Melvin Roberts, Guardian Building, Cleveland.

Marshall H. Francis, Sinclair Building, Steubenville.

William A. Kelly, First Central Tower, Akron.

OKLAHOMA

Chairman: H. L. Smith, Kennedy Building, Tulsa.

Mart Brown, Ramsey Tower, Oklahoma City.

Byrne A. Bowman, Perrine Building, Oklahoma City.

OREGON

Chairman: R. W. Wilbur, Board of Trade Building, Portland.

Borden Wood, American Bank Building, Portland.

PENNSYLVANIA

Chairman: John B. Martin, Land Title Building, Philadelphia.

Samuel W. Pringle, 450 Fourth Avenue, Pittsburgh.

George H. Detweiler, Lewis Tower, Philadelphia.

RHODE ISLAND

Chairman: Felix Hebert, Turks Head Building, Providence.

Henry M. Boss, Jr., Turks Head Building, Providence.

J. Russell Haire, 223 Thames Street, Newport.

SOUTH CAROLINA

Chairman: George L. Buist Rivers, 28 Broad Street, Charleston.

P. H. Nelson, Central Union Building, Columbia.
C. Erskine Daniel, Montgomery Building, Spartanburg.

SOUTH DAKOTA

Chairman: F. G. Warren, Boyce-Greeley Building, Sioux Falls.

Perry F. Loucks, Way-Penny Building, Watertown.

Karl Goldsmith, Pierre National Bank Building, Pierre.

TENNESSEE

Chairman: Aubrey F. Folts, James Building, Chattanooga.

Dan E. McGugin, Jr., American Trust Building, Nashville.

Leslie Bass, P. O. Box 254, Knoxville.

TEXAS

Chairman: Marion N. Chrestman, Republic Bank Building, Dallas.

Newton Gresham, Shell Building, Houston.

W. B. Todd, Commercial Standard Insurance Co., Fort Worth.

UTAH

Chairman: Ralph T. Stewart, Continental Bank Building, Salt Lake City.

Dan B. Shields, Judge Building, Salt Lake City.

Paul H. Ray, Kearns Building, Salt Lake City.

VERMONT

Chairman: Leonard F. Wing, Mead Building, Rutland.

VIRGINIA

Chairman: Andrew D. Christian, Mutual Building, Richmond.

James H. Corbitt, National Bank of Suffolk Building, Suffolk.

W. E. Duke, Court Square Building, Charlottesville.

WASHINGTON

Chairman: Payne Karr, Exchange Building, Seattle.

B. H. Kizer, Old National Bank Building, Spokane.

J. C. Cheney, Miller Building, Yakima.

WEST VIRGINIA

Chairman: Stanley C. Morris, Charleston.

William T. O'Farrell, Kanawaka Valley Building, Charleston.

William G. Stathers, Goff Building, Clarksburg.

WISCONSIN

Chairman: Robert C. Grelle, 105 Monona Avenue, Madison.

John A. Kluwin, 735 N. Water Street, Milwaukee.

Kenneth P. Grubb, 828 North Broadway, Milwaukee.

WYOMING

Chairman: Clarence A. Swainson, Hynds Building, Cheyenne.

M. A. Kline, Majestic Building, Cheyenne.

CUBA

Chairman: Guillermo Diaz Romanach, The Trust Company Building, Havana.

PANAMA

Chairman: William A. Van Sicken, No. 1 Fourth of July Avenue, Ancon, Canal Zone.

American Ideals

By C. WAYLAND BROOKS
United States Senator from Illinois

Delivered at the Annual Convention of the International Association of Insurance Counsel

White Sulphur Springs, W. Va., September 3, 4, 5, 1941

MY first duty, of course, is to thank you for the honor you have done me in allowing me the privilege of sharing this all-important conference.

As your President indicated, it is to be regretted that one of Illinois' outstanding citizens, not only in civil life but in the insurance field, who was to have been your speaker, found it impossible to come and did me the honor to ask me to take his place. I accepted with a great deal of pleasure. I wanted to come here again. I have come to this beautiful spot three times and each time I have seen the grounds and the golf course and the facilities but never have been able to enjoy them, and I thought today surely I would be able to stay, but, as your Toastmaster has said, upon the conclusion of my effort, I will be on my way back to Washington, again denied the pleasure of these beautiful grounds and the fellowship that I am sure I would have with you.

Immediately upon my arrival, my hosts began to impress me with who you all are and the joy that I had in coming began to take wings and I feel very much right now like the little girl from Illinois whose mother told her if she ever graduated from school, she would give her a trip around the world. Finally, the girl finished school and her mother kept her word and started her on a trip around the world. She landed over in Palestine in the dead heat of the summer and she wrote a letter to her mother from there, saying, "Dear Mamma: Here I am in the Holy Land where Christ was born and, Mamma, I wish to Christ I was back in Illinois."

I told that story once and then, looking down the aisle, I saw Bishop Manning and the President of Fordham University and I thought perhaps they might think it was sacrilegious, but I assured them it wasn't, because those of us who come from Illinois think Illinois is God's country after all, though, of

course, we don't challenge anyone else for their desire to claim their spot in the sun.

Louisiana challenged us the other day. One of our citizens bought a piece of property down in New Orleans and, as she should, she asked her lawyer to examine the abstract and see that the title was in good order, and he, in turn, assigned it to a lawyer in New Orleans, and in the course of time, the abstract arrived. In looking over it somewhat hurriedly, the lawyer in Chicago noted that the abstract dated back only as far as 1803 and, without much thought, he sent it back and asked them to carry the title back to its origin, and, in the course of time, there came the reply: "Dear Sir:—The date of the abstract covering your client's property was 1803 because, sir, if you will remember, it was in 1803 that the title of ALL this territory down here was obtained by the United States by purchase from France, but if you wish to go back, sir, you will recall that France obtained title by virtue of conquest from Spain, and, sir, Spain obtained the title by virtue of the discovery of a man whose name you will recall was Christopher Columbus, and, sir, before Columbus set sail, he asked for and received the aid of one, Queen Isabella, and, sir, before she aided him, she sought and received the blessing of the Pope, and, sir, the Pope being the agent of Christ and Christ being the Son of God, I guess it was God's country then and it still is."

I suppose that, being in this glorious atmosphere, no matter where we come from within the confines of the United States, it becomes more self-evident every hour that we are blessed by Divine Providence and our country has a great responsibility ahead of it, and the question that seems to be burning in the sky and in the heart of America is, "Shall America move on to her destiny or will she meet her fate?"

I think it was Carl Schurz who once said,

in speaking about clinging to ideals, that "Ideals are like the stars. You can't reach up and touch them and hold them and fondle them but, like a seafaring man on a desert of water, you search for them and, finding them, if you follow them, you will reach your destiny."

And that brings me to the question, "What are the ideals of America?"

America is an experiment. It is a compromise. It is the amalgamation of the hopes and the dreams, the sufferings and the desires of countless centuries of the men of every creed, in the hope that some day there would be a government under which all men would be equal and the dignity of the individual citizen would be the supreme accomplishment.

Our government was the result of a revolution, a revolution against autocracy, a revolution against the kings and dynasties. They weren't sure what they were revolting about, according to history. Some said it was a war for religious freedom. Bigots among them said it was a war against the Pope, and they burned his effigy in the town squares in Connecticut. Others said it was a religious war, to be sure, but not against the Pope, but against the Church of England. They were just as sincere, but just as vicious.

Men of trade said it was a war for freedom of trade, and others said it was for more—for freedom, for tolerance, for independence. And finally, that became the cry, for in the midst of the revolution and in the midst of their war, they signed a Declaration of Independence, and to that cause they pledged their lives and their fortunes. They chose a common commander; they chose a common Flag; their ideals began to take shape, and they won their war.

And then the question was, "Now that you are free, what kind of a government do you wish to live under?"

That is still the question, and it is only a question in a country where men are free, and it will remain a living question only as long as men guard their freedom. They designed a new kind of government, a government of divided powers, a government of distributed authority and distributed opportunity, and they wrote it down, limiting the power that any one man might ever have over the destinies of a great people. They wrote the rules so that there would never be a reigning house, a royal family, a king, a dictator, a despot, and America started on her march of liberty.

Although men were willing to die and signed their names and pledged their lives and their fortunes for freedom and independence, under this new government, not only several men who signed the Declaration of Independence but several men who became President, owned slaves, and that question was a burning question and for 75 years it continued to burn, until finally it burst into flames.

Illinois had become a state. Illinois was then called upon for what, in my judgment, was to be her greatest contribution of all time, for from Illinois in that tragic hour they sent Abraham Lincoln to become the President.

You often hear, in great political controversy, that this individual or that is not qualified for the office they seek. That could have been said and was said of Lincoln. He was utterly unqualified as an executive, from experience, and yet he became and was the best qualified man in all America, because he loved freedom and hated autocracy, because he believed, above all things else, that this kind of government must live. He was interested in freeing the slaves, to be sure, but he said, "If I could free one slave and save the Union, I would do that. If I could free all the slaves and save the Union, I would do that. If I could free none of the slaves and save the Union, that would be my cause; for all that I do or fail to do, I do to save this Union."

And they won the war because they were fighting to extend liberty, fighting for that equalization that was some day to come. Lincoln—born as humbly as the Son of God, in a hovel, and reared in poverty, finally elevated to supreme command, saved this kind of government, and, like the Son of God, was crucified for his service to humanity.

But America moved on. Womanhood, motherhood, had been elevated to a higher plane of respect and recognition here than anywhere in the world, and yet my pretty mother died before she had ever once been privileged to cast her vote to select a law-maker, a prosecutor or a judge. But that finally came, too, in the march of liberty in America, in the destiny that all men would be equal some day, and by 1917 we stood not only the freest, not only the happiest, but the richest nation in the world,—and it was attributable to no religion and no race, no nationality; it was the amalgamation of the men and the courageous women of every creed and every color and every nationality that came from the Old World in their determi-

nation to help build here and then enjoy a new civilization.

Then we were invited for the first time to go back into the Old World. We were invited to send our men and our money, our prayers, our resources. We were told that if we would do that now, we would participate in a war that would end all wars. We were invited to help make the world safe for our kind of understanding, and that was a challenge. It reached deep into the hearts of America. If America, having enjoyed the blessings of God's bounty, could now make that effort and finally accomplish that result, that was worthy of the sacrifice, and we set to it. We did a good job. We sent 2,000,000 men across the sea. We took 4,000,000 men from their occupations. We completely disrupted our economy and we followed the route of war in the bitter hatreds of the Old World. One thing we failed to take into account and that was that the whole history of Europe can be painted in panels of fury, etched in flame, and the centuries have seen little change except the progress they have made in the deadliness of their weapons and the spread of their fires.

I can remember meeting the soldiers of the Old World for the first time. I remember seeing the blue-coated Poilu and the black Senegalese and Moroccan soldier. I remember the Australian and the Canadian and the British and the boy from Belgium, and the lad from Italy was our friend then. The Scotchman with his kilts saluted, and we were friends. Many of us owed no allegiance to the same country or the same flag. We were not of the same color, nor did we speak the same tongue, but we were friends. Why? Because our government said we were friends, and we were massing and drilling together to meet another lot of fellows,—and they were different. The other fellows were mean and mad and vicious. They were tramping out civilization; they were burning cities; they were the enemies of civilization itself, and we were to meet them and conquer them; and some of us met some of them personally, and we didn't meet a mad man; we met a fellow very much like we were, born of the same human flesh, with the same human emotions, a man who didn't want to die any more than we wanted to die, and a man that cried when he was hurt in that line—and, believe me, you do cry when you are hurt in that line. But we met him. We conquered him. And then we came home.

We have been celebrating for 25 years, al-

most, our participation, but, just like the panels of fury being painted constantly across the sea, the conference table had no sense of justice. It was power politics again. The dignity of the common man had been glorified for a day, to be sure. So far as I know, no nation built a great monument to a great military leader that could in any way compare with the monument they built in recognition of their unknown soldier, and the common soldier, the common man, was glorified, and even Germany tried to build a government under the pattern of a constitution.

And then the old power politics put on the squeeze again and we went through a depression; our homes were mortgaged; many people lost their farms, and we said to ourselves, "We will never do that thing again." America was serious in that. We would never do it again, because it seems that we are not big enough. We are only one-sixth of the world's area. We are only one-seventh of the world's people. Rich as we are, we can't, in all our power, reach out and police the bitter hatreds of the whole world, and that, in my judgment, is not a part of the destiny of America. We are a Christian-hearted people. We are a charitable people. There has never been a time that America didn't respond to the cries of the want of people, regardless of whence it came. I can remember when China had a famine. Almost every church in America, the lodges of America, the communities of America, took up collections, and millions in supplies were rushed to China.

I can remember when Japan had an earthquake. The Red Cross put on one of its greatest drives throughout America; millions were collected, and the Navy, the destroyers of the United States Navy, piloted the way to carry steel to Japan to rebuild her homes as a result of the destruction wrought by that earthquake.

After the last war, we sent millions upon millions to the unfortunate children in the Near East. And we didn't stop there. The farmers of America contributed 100,000 cows and we paid for the transportation to take them into Germany to rebuild the bodies of the sons and daughters of the men we had met in the lines.

It has been the heart of America to reach out in every instance to people who are in distress, and that is still our purpose, and it is our purpose and our policy now and I firmly believe that we should aid now, men who are fighting for their liberty, fighting for a philosophy that most nearly resembles our

own, but I think we should send them material aid, and that does not, in my judgment, include the blood of the sons of the United States of America.

I believe firmly that you men and ladies, as the legal counsel, engaged as you are in legal practice and having training and ability along legal lines, should be much concerned about the effect in our own country, regardless of whether we enter the war. We now are considering in the Senate a tax bill that will bring in a little short of four billion dollars, and in less than a week, no doubt, we will be asked for another lease-lend bill for more money than that. Even though we have scraped the till, we have dug down to the bottom of the barrel in trying to collect taxes, yet it is only 10 per cent or less than 10 per cent of our commitments already made this year.

It doesn't take a mathematician to see where that thing will lead. It will take courage on the part of men like you to explain as best you can and resist every element of waste and unnecessary lending and giving away of the resources of America, because of the effect it will have on the policyholders that you represent. There are literally millions of people in America who have entrusted the future of their families to you and your good advice. They have said to you, when they invested their money in your policies, that they believed that you and the officers of the companies you represent could best guard their funds and best invest them, better than they could themselves, for the future benefit of their wives and their children and their loved ones.

Now, the question is, how far will you go in advocating participation in Europe's age-old bitterness, to the utter and absolute destruction of the value of the confidence and the money that has been placed in your charge? You have never had such a challenge in your whole lifetime, and I ask you to think, when you leave this conference and head back to the law office, "Have I made a contribution to the security of the millions of people who have entrusted their funds to my care?"

Up to now, you can be boastful and you can be proud of the part you have played in the march of destiny of America. Do you want to see a monument to insurance? Well, look around you. There isn't a railroad, there isn't a bridge, there isn't a big building, there isn't a happy home, there isn't a city that isn't a living monument to life insurance

and insurance as we understand it in America,—and it has been through the direction of you men that that has been brought about.

But you are in the twilight zone. Government has already convinced the people of America that their money isn't safe in the hands of private enterprise in the bank unless the government insures it. The government has already convinced a majority of the people of America that they can have no social security unless the government manages the bills. And yet out of the billions that the government has taken in taxes from the working man and his employer, it is represented today only by an I. O. U. from the government. It has gone into the treasury as General Funds, and we have given billions away to other countries while we have piled that debt higher, raised our debt limit from 45 to 65 billions, and we are heading head on for 100 billions. And still those billions that they have taken from the workers have been loaned or leased or maybe given to Russia.

There will be many a working man mortgage his home next year to meet his tax bill to help save the home of some country that would destroy the very government that allows him to own his own home.

This thing is going with such rapidity that you would better analyze your part in it and the things that you must do if you are going to continue as a part of private enterprise. I have always believed and I believe now that private enterprise, known as American business, of which you are a part, and the American Government are the twin sons born only of Columbia. They were born here and they were weak in the beginning, but they have grown tremendous and great, the strongest in the world, because they sustained each other. But when one of them tries to cripple, to injure or dominate the other, in my judgment, they both will die. The things that we have enjoyed in this country in our standard of living are finer and greater and more abundant than have been known to any people in the world. But the government didn't create them.

What is it you want, as a free citizen? You want freedom of speech, sure. You want freedom of religion, sure. You want freedom to act as you please, sure. But what do you want it to bring you? You want clothes to wear; you want a house to live in, and in it you want conveniences; you want electric lights and electric fans and a radio. You

want electric refrigeration and a furnace and running water. You want an automobile. You love the pride of sitting in your own car, riding on cushions and rubber tires, and turning a knob and creating your own light and turning another knob and having your own power, and turning still another knob and listening to the melodies of the world.

But the government didn't create one iota of it. It was private enterprise in America. It was the genius of the free mind and the free brain that made us the great country that we are, and we are heading mighty close to that all out control by the government, and I predict today that priorities, price fixing, curtailment and taxes will do more harm to America in the next two years than any alien tyrant could ever do in the next fifty,—and that is something for you to be concerned about, for when they reach out, knowing that we can only collect four billions, less than 10 per cent of our one year's commitments, in taxes, although it will be the heaviest tax load any American citizen has ever carried, they will reach out for the assets of the insurance companies and they will reach out for the control of the insurance companies, and then we will all be doing what our forefathers said they would not allow to happen. And they didn't allow it to happen. If it happens, you and I will have allowed it to

happen. We inherited the finest government on God's earth. If it wasn't for that, I couldn't be in the Senate. They don't allow boys coming from humble homes such as mine to some day sit in the Senate when one man controls the destiny of an empire. It is only because that government was still alive that I was privileged to have the honor of being one of the Senators of the sovereign State of Illinois. It is only because of that and that kind of government that I still have faith in my insurance policy.

I have faith in you, but I am wondering how long we can move on, sitting quietly by. Can we be the all out arsenal of all the world? Can we be the unlimited treasury of all the world and still have assets anywhere near sound? When you are thinking of other things in your conferences, please take that one close to your hearts, and then use your influence as you see fit. I hope you make the right choice as to where you should place your influence as we move into the darkened future still asking the question, "Shall America move on to her destiny or detour back into the Old World and meet her fate?" Whatever you decide, do it with all your will, for this is an hour for strong minds and action on the part of the free men of America, and in your action I wish you good luck and God-speed.

The Federal Rules of Civil Procedure And Their Applicability to Insurance Litigation

By JOHN L. BARTON,
Omaha, Nebraska

INTRODUCTORY

MUCH was done to simplify procedure and expedite the administration of justice when the Congress of the United States authorized the Supreme Court to prescribe the forms of pleadings and process and direct by specific rules the practice and procedure of the Federal District Courts throughout the land.

These rules instantly established a uniform system of procedure, eliminated many useless delays and raised the Federal practice

out of innumerable confusing and perplexing situations.

This new method of practice and procedure was made possible by the Act of Congress of June 19, 1934. The rules became effective according to the provisions of Rule 86., Sept. 16, 1938.

While the Rules seem very comprehensive and appear to provide for most every contingency that might arise, many problems of interpretation have arisen and undoubtedly many more will arise.

It seems that the Rules are susceptible of being divided into eight great divisions.

- I. Commencement of Actions, Process, Pleadings and the Formulation of Issues.
- II. Parties.
- III. The Acquiring of Evidence, Depositions and Discovery.
- IV. Trial.
- V. Judgment and its Incidents.
- VI. Provisional and Final Remedies, Special Proceedings.
- VII. Appeals.
- VIII. District Courts and Clerks.

The foregoing is necessarily introductory. It lays the foundation for a discussion of the subject, embodied in the title of this paper.

INSURANCE LITIGATION

Since this article must be confined to those judicial interpretations of the Rules in the field of insurance litigation, our attention will now be focused on this special subject.

Of course, it is not expedient and neither time nor space will allow to take each rule and develop its interpretation by the courts from the effective date to the present time. Only such of the rules that have provoked extensive judicial interpretation and pertain to insurance litigation will be dealt with here. This discussion will, therefore, deal principally with:

- Rule 14—Third-Party Practice.
- Rule 33 & 12 (e)—Interrogatories vs. Bill of Particulars.
- Rules 35 (a)—37 (b) (2) (iv)—Physical Examination.
- Rule 38—Request for Jury Trial.
- Rule 50 (a)—(b)—Motion for Directed Verdict—Reservation of Decision on Motion.
- Rule 52 (a)—(b)—Findings by the Court—Amendment.
- Rule 56 (a) (b) (c)—Summary Judgment—For Claimant—For Defendant Party—Motion and Proceedings.
- Rule 57—Declaratory Judgment.
- Rule 82—Jurisdiction and Venue Unaffected.

RULE 14 (a). WHEN THE DEFENDANT MAY BRING IN THIRD-PARTY

Extensive litigation over the interpretation of Rule 14 has absorbed the attention of

many of the District Courts. In the case of *King v. Shepherd*, 26 Fed. Supp. 357, District Court (Western District of Arkansas), there an objection to venue was sustained.

King filed suit in the District Court against one Shepherd as a result of personal injuries alleged to have been sustained by reason of an automobile accident occurring in the city of Fort Smith, Arkansas. The plaintiff was a citizen of the state of Arkansas, the defendant was alleged to be a citizen of Oklahoma. Prior to answer date the defendant, Shepherd, filed a third-party complaint against the National Mutual Casualty Company as a third-party, defendant alleging that the third-party defendant carried a policy of insurance indemnifying him against liability by reason of automobile accidents and contracting to defend the said Shepherd. He further alleged that the third-party defendant had failed to fulfill the agreements of the insurance contract by refusing to defend the action filed by King. The ground upon which the jurisdiction of the court was invoked was diversity of citizenship between the parties, the third-party plaintiff, Shepherd, alleging that he was a citizen and resident of the State of Missouri and the third-party defendant was a citizen of the State of Oklahoma. The jurisdictional amount was also alleged. The National Mutual Casualty Company moved to dismiss the action against it for the reason that the Western District of Arkansas was not the proper venue in which said action could be brought and that the sole ground of jurisdiction of the Federal Court was because of the diversity of citizenship between the said third-party defendant and the third-party plaintiff.

It was further alleged that the third-party plaintiff was a resident of the State of Missouri and the third-party defendant of Oklahoma, and that neither of the parties were residents of the Western District of Arkansas and further alleged that the cause of action arose wholly within the State of Oklahoma, that the venue of said action (based upon said diversity of citizenship) would be in the Northern District of Oklahoma, the residence of third party defendant.

Judge Ragon sustained the motion to dismiss third party complaint, stating:

"While the new rules provide for third-party actions, they likewise specifically provide that the jurisdiction and venue of actions shall be unaffected, Rule 82."

He further stated:

"The venue of the action set forth by the third-party plaintiff would not be in the Western District of Arkansas and Rule 82 specifically limits the application of the Rules so far as they relate to jurisdiction and venue so as to exclude the present case."

Crim v. Lumbermen's Mutual Casualty Co. 26 Fed. Supp. 715, District Court of the District of Columbia. This was an action by Virginia R. Crim against the Lumbermen's Mutual Casualty Company to recover an amount alleged to have been agreed by the defendant to be paid plaintiff for desisting from filing an action against the estate of Charles Newburgh, deceased, for damages for personal injuries and for fraudulent misrepresentations inducing plaintiff to abandon such cause of action.

Before answering the defendant, Lumbermen's Mutual Casualty Company, with leave of court, filed a third-party complaint against W. W. the attorney for plaintiff, Virginia Crim. The third-party complaint in substance alleged that the laws of the State of Maryland provided that executors and administrators shall be liable to be sued in any court of law or equity, in any action which may have been maintained against the deceased (except for slander) provided, however, that such action against the executor or administrator be commenced within six calendar months after the death of such person. Third-party complaint further alleged that under the laws of Maryland the "family car doctrine" was not recognized as applicable, and that the deceased, Charles Newburgh, was the son of the insured, Frederic C. Newburgh, and that the insured Frederic C. was not liable to one injured by the negligence of his son who was using the car wholly for his own purposes and not for the purpose of such owner, and that the fact that the father gave special or general permission to use the car was immaterial. The third-party defendant denied that it entered into an oral agreement with the plaintiff Crim for the payment of any sum of money as alleged in the original petition and further alleged that due to the negligence of W. W., plaintiff's attorney, who it was alleged should have known the law of Maryland, failed to bring suit against the executors of the deceased Charles Newburgh within the statutory time allowed

by the laws of Maryland. It further alleged that it became and was the duty of the third-party defendant to protect the rights and interests of Crim, by instituting suit within the time necessary to maintain said cause of action.

It was finally alleged that W. W. was liable for the plaintiff's claim against the defendant and judgment was demanded against third-party defendant for all sums that might be adjudged against the third-party plaintiff and payable by the Casualty Company.

W. W., third-party defendant, moved to dismiss the third-party complaint for the reasons: (1) That the third-party complaint failed to state a claim upon which relief can be granted. (2) And for other good and sufficient reasons to be urged upon a hearing of this motion. Venue was not involved.

The question, therefore, for the court was whether or not this was a proper case for a third-party complaint. The Court held:

"Defendant may bring in third-party defendant by third-party complaint, setting out claim which might have been asserted against such third-party defendant had he been joined originally as defendant."

The Court said:

"The Third-party complaint is confined to the theory that the third-party defendant W. W. is liable to the plaintiff for all of the plaintiff's claims against the defendant corporation.

"Under the provisions of Rule 20 (a) the plaintiff might have joined W. W. as a defendant in the original declaration or complaint.

"Had the plaintiff joined W. W. in the original declaration with the defendant corporation, she would have asserted against him in the alternative a right to relief based on his negligence in respect of and arising out of the same transaction or occurrence which gives rise to her claim for relief against the defendant corporation. The transaction or occurrence was the loss of a valuable right, that is, her cause of action against the estate of Charles Newburgh for damages on account of personal injuries sustained by her due to the negligence of the deceased.

"The question of fact common to both defendants, W. W. and the corporation, in such case would be (1) Whether the plaintiff had a cause of action for damages against the estate of Charles Newburgh,

deceased, (2) Whether she asserted that cause of action.

"That under Rule 14 the plaintiff could amend her complaint if she so desired in line with the foregoing and assert her claim against W. W.

"It is not contended that there is a joint liability. The amended complaint cannot proceed upon that theory. The joined claims are not independent claims but alternative claims, as we have seen, and judgment cannot go against both defendants. One or the other is liable to the plaintiff. Therefore, a judgment against the defendant corporation cannot be collected from the third-party defendant, W. and that is true also in case judgment is rendered against W. It cannot be collected from defendant corporation.

"In a case where the third-party defendant is liable to the third-party plaintiff in contribution or indemnity, then the third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, etc. That question is not involved here. The third-party plaintiff is not seeking contribution or indemnity. By its third-party complaint the defendant corporation simply tenders to the plaintiff a third-party defendant, who, it is alleged, is liable for all of the claim asserted against it.

"The motion to vacate the order granting leave to file the third-party complaint was over-ruled. The court stating: 'If the plaintiff declines to amend the complaint and assert a claim for relief against the third-party defendant, the court is inclined to believe that judgment cannot be awarded against the third-party defendant, W., in favor of the plaintiff.'

Tullgren v. Jasper, et al, District Court of Maryland, 27 Fed. Supp. 413. In this case the plaintiff was a passenger in the taxi cab driven by Goldstein, owned by Jasper and being operated under the control and for the use of the Association of Independent Taxi Operators, Inc. The taxi cab was in a collision with an automobile truck (driven by Wood) and owned by Hoffmeister. The petition prayed for damages, for injuries sustained by reason of the negligence of the drivers of the two vehicles.

The Association of Independent Taxi Operators, Inc., filed a third-party complaint against the Maryland Casualty Company, al-

leging that the Casualty Company had a policy of liability insurance on the Hoffmeister truck and that if there was a joint judgment against the defendants that by reason of the Casualty Company's policy it would be liable for payment of a proportionate amount of such judgment.

The Casualty Company moved to dismiss the third-party complaint for the following reasons: (1) That the complaint failed to state a claim upon which relief could be granted. (2) That it was not a proper party and cannot be brought in under Rule 14. (3) The Court was without jurisdiction in that the cab operators, Hoffmeister and the Maryland Casualty Company are all citizens of Maryland and, therefore, no diversity of citizenship exists between them.

Judge Chestnut made the following observations in arriving at a decision in the case?

"It will be noted that the Casualty Company, the third-party defendant in this instance has no relationship either *ex contractu* or *ex delicto* with the defendant, The Association of Independent Taxi Operators, Inc. The Maryland Casualty Company is alleged to be the insurer not of The Association of Independent Taxi Operators, Inc. but of E. A. Hoffmeister and the latter has not sought to implead the Maryland Casualty Company as its insurer. A person not made a party to the action by the plaintiff may be impleaded by a defendant only when the former 'is or may be' liable to the said defendant or to the plaintiff. It seems reasonably clear that the Maryland Casualty Company sought to be impleaded by the defendant, The Association of Independent Taxi Operators, Inc. is not liable to the latter; and therefore the Maryland Casualty Company may be properly impleaded only, if at all, on the theory that it 'is or may be' liable to the plaintiff."

The theory of the third-party complaint was based on a Maryland statutory provision providing for proceedings against an insurance company in the event of non-payment of the judgment against the insured. It also invoked a Maryland statute providing for contribution between joint feorsors where there is a joint judgment and payment is made by one in excess of his pro rata share.

The third-party defendant, Casualty Com-

pany also objected on the ground that in jury trials it would be prejudicial to the defendant to permit the jury to have information that the defendant is insured.

Judge Chestnut in dismissing the third-party complaint stated:

"A more persuasive argument for the dismissal of the insurer is that it is not directly but only secondarily liable to the plaintiff in the event of the non-payment of a judgment against the defendant insured."

"But even this consideration, I think, is not conclusive on the point because there may be cases in which a liability insurer could properly be brought in as a third-party defendant by the insured * * * in case the insurer denies liability and refuses to defend the action in accordance with its policy, I see no logical reason to deny to the insured who is the defendant in a suit the right to bring in the insurer as a third-party defendant, where under the terms of its policy it would be liable over to the insured defendant and where the judgment against the defendant will establish the liability of the insurer."

The Court further said on the objection to jurisdiction:

"Another objection made by the Maryland Casualty Company is of very general importance. The objection is that the court has no general Federal jurisdiction between it and the Association of Independent Taxi Operators, Inc. because both are Maryland Corporations and there is no diversity of citizenship between them."

"The objection here is not based on improper venue but on the alleged absence of diverse citizenship. It is observed that if the objection is good, the scope of application of the Rule will be greatly restricted as to third-party practice where the general jurisdiction of the court is based alone on diverse citizenship.

"The answer to the question seems to depend upon the consideration whether the third-party practice in a particular case is an ancillary proceedings incidental to the main suit or whether it is to be more properly regarded as a separate and independent new suit. If the former view prevails, then the jurisdiction is not wanting because the ancillary jurisdiction of the Federal Courts is well established as an essential attribute of the jurisdiction * * *

"We are here dealing with procedural matters only, and there is very substantial ground for the view that as the general jurisdiction of the court properly attached under constitutional and statutory provisions to the suit between the original plaintiff and the original defendant, it should proceed to do final and complete justice as between all parties affected by or liable on account of the same set of facts.

"It is to be observed that the alleged absence of general jurisdiction in this situation stands on a different basis from that of absence of venue jurisdiction. The former is dependent upon a judicial determination as to whether the third-party practice is ancillary to the main suit; while the latter depends directly upon the Federal statutes as to venue, which in most cases provide that no defendant can be sued in a District of which he is not an inhabitant. This is a personal privilege which may be waived but when insisted on is good, even though the defendants may happen to be present and served with process in the District where the suit is pending; except, of course, as provided by statute in the case where the jurisdiction of the court is based only on diverse citizenship."

"As already pointed out, the Casualty Company is here sought to be impleaded not by the plaintiff nor by any defendant which has a direct relationship to it; but by an original defendant with which it has no relationship whatever. * * * The wording of the Rule would seem impliedly if not expressly to exclude the procedure here attempted."

"And finally it may be observed that leave to bring in third-party defendant is not mandatory but in the sound discretion of the court * * * in my opinion no useful purpose would be subserved by continuing the Maryland Casualty Company as a party in this case."

Gray et al vs. Hartford Accident & Indemnity Company, (Robison, et al, third-party defendants) 31 Fed. Supp. 299, Western District Louisiana. Objection to venue overruled.

In this case an automobile being driven and owned by J. A. Robison with whom were riding Mrs. J. A. Robison and Mrs. Gray collided with a truck of the Rothschild Boiler Works. Robison carried a policy of liability

insurance with the Aetna Insurance Company and the Rothschild Boiler Works carried a policy with the Hartford Accident & Indemnity Company. Suit was filed by Mrs. Robison and Mrs. Gray against the Hartford Company (permissible under Louisiana law). The Hartford Company removed the case to the Federal Court. Hartford then filed a third-party complaint under Rule 14 alleging that the accident was caused solely by the negligence of Robison, alleging in the alternative that if said accident was not caused solely by the negligence of Robison the negligence of Robison was the proximate cause of said accident and he was and is a joint tortfeasor; and finally alleging that the plaintiff had a like claim against the Aetna Casualty & Surety Company under the terms of its policy issued to Robison and by virtue of the laws of the state of Louisiana which accords to an injured person a right of action against a liability insurer.

The third-party plaintiff prayed for an order making Robison and the Aetna third-party defendants. The original plaintiffs, Robison and Gray, moved for an order revoking and rescinding the previous order of the court bringing in the third-party defendants, claiming:

- "(1) There is no authority for such procedure.
- (2) If there be authority for such procedure, defendant Hartford is not entitled to employ it for the reason that under the law of Louisiana there is no right of contribution among joint tortfeasors.
- (3) The allowance of such a procedure retards unduly the main action of plaintiffs."

JUDGE PORTERIE, in disposing of the motion of the original plaintiffs seeking to rescind the former order and the motion of third-party defendant to vacate and recall the order, said:

"The second contention of mover that the Louisiana law provides no right of contribution among joint tortfeasors falls because such is not the substantive law of Louisiana.

"The third contention of mover that the allowance of this third-party claimant would retard the main action of plaintiffs as previously reasoned falls. It is obvious

that the complete civil action of the plaintiff will be hastened.

"Subsequently, counsel for Robison and the Aetna * * * moved to dismiss the cause for want of jurisdictional or venue requirements as to them; also (a) that neither the original complaint nor the third-party complaint discloses any claim against either of movers upon which relief can or should be granted * * * that original plaintiffs have disclaimed all rights and all authority to proceed against movers (Robison and Aetna) by virtue of the procedure attempted. (b) That Hartford is without right to proceed against Aetna by reason of the utter want of privity between them and the absence of any contractual, statutory or other rights against Aetna under the policy of insurance issued by it to Robison. (c) Robison is not subject to suit by his wife for any claim predicated ex delicto for injuries sustained by her in Louisiana." The court further held:

"On the point urged as to venue and jurisdiction the third-party claim is considered as ancillary to the main claim and venue and jurisdiction are not to be considered. Citing *Bossard et ux vs. McGwinn*, et al, 27 Fed. Supp. 412, and other cases, including *Lewis v. United Air Lines Trans. Corporation*, et al, 29 Fed. Supp. 112.

"The court admits that the original complaint discloses no right of action against Mr. Robison and his insurer, the Aetna, but it does disclose the facts of an accident in which negligence is alleged against the employee of the Rothschild Boiler Works, which negligence is assumed, by liability contract, by the Hartford Company. The motion made by the Hartford Company certainly contains the necessary allegations to make a claim against Mr. Robison and his insurer. The Hartford Company forwards the negligence from itself to Robison and his insurer, the Aetna Company. That is all that is necessary under Rule 14.

"The court is of the view that privity between the Hartford Company and the Aetna Company is born from the legal relations established by the Louisiana Code; arising spontaneously from the accident and its content of negligence. See Articles 2315, 2318, 2324, and 2104 of the Civil Code of Louisiana.

"But in the present case we are to apply

the substantive law of the state and the procedural law of the Federal Courts. Therefore, the husband must answer the third-party complaint. * * * If there is a substantive right to indemnity or contribution accruing to defendant as against the third-party defendants, the procedure for its enforcement is Rule 14 of the Federal Rules of Civil Procedure. The present motion to rescind and revoke the former order is refused; also motion of third-party defendants to vacate and recall order, and to quash and annul writs of summons and returns is overruled."

CONFLICT OF AUTHORITY-VENUE

There is a serious conflict of authority among the Federal District Courts as to whether the Federal venue statutes are applicable to third-party proceedings which are brought under Rule 14, and as to the effect of Rule 82 on such proceedings. In view of the express provision of Rule 82 that such Rules shall not extend or limit the jurisdiction or venue of actions.

It was held in *King v. Shepherd*, *supra*, that the venue of a third-party proceeding is the same as that of an independent suit. For the same holding, see *Lewis v. United Airlines Transportation Company, et al*, 29 Fed. Supp. 112. (Not an insurance case). The Federal District Court of Connecticut held:

"An ancillary bill is 'original action' within Federal venue statute for purposes of jurisdiction over persons of defendants first brought into case thereby, regardless of relation of subject-matter thereof to that of original action, *but such defendants may object to venue*, irrespective of ancillary jurisdiction over subject matter of supplemental proceeding, in absence of consent to the jurisdiction over their persons. Jud. Code Sec. 51, 28 U. S. C. A. 112."

In this case, Judge Hincks sustained motion to dismiss third-party defendant, Bethlehem Steel Company, on ground of improper venue and dismissed third-party complaint. However, Judge Goddard of the District Court of the Southern District of New York in *Morrell v. United Airlines Transportation Corporation*, 29 Fed. Supp. 757, overruled the objection of the same third-party defendant, Bethlehem Steel Company to its being brought in as a third-party defendant and specifically overruled the third-party defend-

ant's objection to the effect that venue was improper, stating:

"Moreover it is clear that the spirit and purpose of Rule 14 to a great extent would be frustrated if the venue statutes had to be applied to third-party proceedings, under the Rule. Certainly a third-party residing outside this jurisdiction who is brought in under Rule 14 suffers no greater hardship in making his defenses there than those which must be borne by non-resident defendants in a case founded only on the diversity of a citizenship jurisdiction."

It is interesting to note that both of these cases arose out of the same accident wherein a transport plane crashed in Ohio, killing the decedents for whom these actions were brought. In each case the third-party complaint set forth negligence of Bethlehem Steel Company with reference to a cylinder manufactured and furnished by the Bethlehem Company and installed in the motor and also alleged breach of warranty as to the fitness of the cylinder. For a discussion of the apparent conflict on the question of venue, see 129 A. L. R. 915-920.

It has been held, however, that venue can be waived by the act of the defendant foreign corporation designating a local agent for service of process in compliance with a condition imposed upon its admission to do business in the state. *Neirbo Company vs. Bethlehem Ship Building Corporation, Ltd.*, 308 U. S. 165-179 L. Ed. 167, wherein it was held:

"A foreign corporation which has designated a local agent for the service of process in compliance with a condition imposed to its admission to do business in the state thereby surrenders, as to suits in the Federal courts sitting in that state, the privilege conferred by the provisions of Section 51 of the Judicial Code (28 USCA Section 112) that where Federal jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

THIRD PARTY COMPLAINT DISCRETIONARY

The weight of authority appears to hold that the practice of allowing the filing of

third-party complaint is within the sound discretion of the court and not obligatory.

Such was the ruling of District Judge Donohoe, District Court of Nebraska, in *McPherrin v. Hartford Fire Insurance Company*, (Phoenix Insurance Co. third-party defendant) 1 F. R. D. 88.

In this case, McPherrin's cattle had arrived over the Union Pacific Railroad at a feeding yards just west of Omaha where shipment was stopped for feeding in compliance with the law. While the cattle were in the feed yards a fire destroyed them.

The plaintiff commenced the action against Hartford Fire Insurance Company based on a policy of insurance which the plaintiff alleged was in full force and effect at the time.

Prior to answer day the Hartford obtained leave of court to file third-party complaint, bringing in the Phoenix Insurance Company who had issued a fire policy to the Valley Stock Yards & Grain Company in whose yards the cattle were destroyed.

The Phoenix Insurance Company filed a motion to strike in which it alleged that the third-party neither is nor may be liable to the original defendant, Hartford, and charged that the plaintiff could not in the first instance have joined the third-party defendant with the third-party plaintiff, Hartford, and that there was no element of contribution between insurance companies, or co-insurance or other contractual engagements diminishing or otherwise affecting the liability, if any, of the original defendant, Hartford. To the motion to strike was a copy of the Phoenix policy on Valley Stock Yards & Grain Company, which contained this clause:

"It is specifically understood and agreed that if there be any specific insurance on live stock, as above described, then this policy shall apply only after said specific insurance is exhausted."

The court in sustaining the objection of Phoenix Insurance Company and vacating the order making Phoenix a third-party defendant, said:

"The Rule is not obligatory. It is within the sound discretion of the trial judge, whether to apply the Rule in a case or not * * * *. If we are to be motivated by the purpose of the Rule but little further discussion is necessary. Suffice it is to say that the third-party procedure in this case:

- (a) Complicates the procedure. (b) Has delayed and will delay a speedy trial.
- (c) Adds expense to the litigation.

"The question of venue that was raised we think has been settled recently by the Supreme Court in the case of *Nierbo Company v. Bethlehem Ship Building Corporation*. 308 U. S. 165, 179, 84 L. Ed. 167."

From the foregoing, we draw the following conclusions:

- (1) Requisite jurisdiction for third-party complaints is found in the original action.
- (2) The third-party proceedings is ancillary to main suit.
- (3) Conflict in authority as to venue, thusly:
 - (a) Venue may be waived but when objection made it is good.
 - (b) Venue will not be considered if other jurisdictional requirements are present.
 - (c) Corporation by designating local agent for process in compliance with admission laws of States waives objection to venue.
- (4) Allowance of third-party complaint is discretionary and not mandatory.

INTERROGATORIES V. BILL OF PARTICULARS

Attention will now be given to Rule 33 and and Rule 12 (e).

RULE 33 INTERROGATORIES TO PARTIES

RULE 12 (e) MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS

In the writer's search with reference to the application of these two rules, it is found that the courts have refused to permit interrogatories under the guise that such information to be obtained by interrogatories is necessary to enable the party to reply to a pleading. The courts have uniformly held that if the litigant desires more definiteness and particularity in the pleading to which he wishes to respond, his remedy is motion for Bill of particulars Rule 12 (e). However, where it is necessary for the litigant to obtain information upon which he can prepare and present his defense, such information can be obtained

by interrogatories, Rule 33, (and, of course, depositions.)

Smith vs. Employers Fire Ins. Co., Same vs. North River Ins. Co., Same vs. Home Insurance Co., District Court, Northern District Illinois, 1 F. R. D. 251.

In this case, the complaints alleged that the defendants had each issued a policy of insurance on a yacht on account of the owner, that plaintiff was the owner of the yacht and that after the issuance of the policies the yacht was damaged to an amount exceeding \$84,000.

In each of these cases defendant moved for a bill of particulars, setting forth the grounds as: (a) that defendants are informed that plaintiff had other insurance on his yacht; (b) had been fully indemnified for his loss and had no interest in the suit; (c) that if the particulars called for were given, the fact that plaintiff had no financial or other interest in the litigation would appear upon the record, whereupon a motion to dismiss could be made and would have to be sustained, thereby ending the litigation promptly and with a minimum of expense.

The court, in denying the motion for bill of particulars, said:

"While I favor a liberal interpretation of the rules, and an early determination of the issues involved in a case is greatly to be desired, I do not think I should attempt to change the rules laid down by the Supreme Court. In drafting these rules the committee which had the matter in charge carefully distinguished between information necessary to enable a party to reply to a pleading and that necessary to present its defense. The former may be obtained by a motion for a bill of particulars, Rule 12 (e), Rules of Civil Procedure for District Courts, 28 U. S. C. A. following section 723c, the latter by interrogatories, Rule 33."

It was held in *Schweinert v. Insurance Co. of North America*, District Court, Southern District New York, 1 FRD 247, that interrogatories had their limitations and must not be allowed to develop into a "fishing excursion."

The Court said:

"I have carefully read the examination so far as conducted. It appears to me that

plaintiff is seeking to discover the steps being taken by the defendant in preparation for trial and not relevant matters. Furthermore, that she hopes to make available to herself the fruits of an investigation undertaken by the defendant at its expense."

It was held in *Leimer vs. State Mutual Life Assurance Co. of Worcester, Mass.*, 1 F. R. D. 386:

"The principal object of a bill of particulars is to enable a litigant to plead intelligently. Rules of Civil Procedure for District Courts, Rule 12 (e)."

Also:

"Plaintiff's applications for bills of particulars were denied where averments of answer were clear, and particularly where plaintiff could obtain all information she sought under several methods of discovery provided by the Rules of Civil Procedure."

RULE 35 (a) and RULE (b) (2) (IV)

Rule 35 (a). "Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

Rule 37 (b) (2) (IV). "In view of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any such orders *except an order to submit to a physical or mental examination.*"

Omission is made in this discussion of Rule 35 (b) and of Rules 37 (a), (c), (d), (e), and (f). The discussion with reference to the parts of the two Rules above quoted is important to every lawyer defending an insurance company. For this reason, special emphasis is laid upon those parts of Rules 35 and 37 above quoted.

Under Rule 35 (a) there no longer is any question of the right of a defendant to apply for an order requiring a person to submit to a physical or mental examination when the

physical or mental condition of the party is in controversy.

Under Rule 37 (b) (2) (IV), provision is made for the court to punish for refusal to obey an order even providing for an arrest of any party or agent of a party for disobeying such orders. However, an exception is specifically made by Rule 37 (b) (2) (IV) upon the refusal of a person to submit to physical or mental examination when ordered by the court to do so. Such refusal cannot be punished by an arrest of the party but other appropriate action may be taken by the court such as striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action, or rendering a judgment by default against the disobedient party.

The following case, although not an insurance case, is important because lawyers representing insurance companies in actions where personal injuries are claimed and damages sought should be conversant with the interpretation of Rule 37 (b) (2) (IV) by the Supreme Court of the United States.

The District Court of the Northern District of Illinois in the case of *Sibbach vs. Wilson & Company, Inc.*, ordered the plaintiff to submit to a physical examination at a designated physician's office. The plaintiff refused and upon a motion by the defendant, a rule was entered upon the plaintiff to show cause why she should not be adjudged in contempt of court in refusing to obey such order.

Upon the hearing, the Court found the plaintiff guilty of contempt and ordered that she be committed to the jail of Cook County until she complied with the order. From the order an appeal was taken by the plaintiff to the Seventh Circuit Court of Appeals, *Sibbach vs. Wilson & Company, Inc.*, 108 Fed. 2d 415. The Circuit Court held:

"Where plaintiff in action for injuries refused to submit to physical examination as required by court's order, District Court's action in committing plaintiff to jail for contempt was not error. Rules of Civil Procedure for District Court, Rule 35 (a)."

The order of the District Court was affirmed.

On Writ of Certiorari the matter was reviewed by the Supreme Court of the United States where the decision of the Lower Court

was reversed and remanded for further proceedings. 312 U. S. 1, 85 L. Ed. 349.

The Supreme Court held:

"The commitment for contempt of court of a party failing to comply with an order of a Federal District Court of physical examination made under authority of Rule 35 of the Rules of Civil Procedure in Federal District Courts is reversible error, in view of the express exception of such order in the provision of Rule 35 (b) (2) (IV) for arrest for disobedience of an order for discovery."

Mr. Justice Roberts, writing the opinion (for a divided court), said:

"The District Court treated the refusal to comply with its order as a contempt and committed the petitioner therefor. * * * We think, however, that in the light of the provisions of Rule 37 it was plain error of such a fundamental nature that we should notice it. Section (b) (2) (IV) of Rule 37 exempts from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination. The District Court was in error in going counter to this express exemption. The remedies available under the rule in such a case are those enumerated in (b) (2) (I) (II) and (III). For this error we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion."

RULE 38. JURY TRIAL OF RIGHT

Sub-division (b) of this Rule provides that the demand for jury trial must be made not later than 10 days after the service of the last pleading directed to such issue. However, Rule 6 (b) (2) (Enlargement) provides in substance upon motion the court may permit an act to be done after the expiration of a specified period where the failure to act was the result of excusable neglect.

Rule 39 (b) provides:

"Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

In *Gruskin vs. New York Life Ins. Co.*, v. F. R. D. 22, the District Court of the Western District of Pennsylvania sustained the motion of the plaintiff (request for jury) even though the last pleading was filed on March 1, 1939 and the request for jury trial was not made until May 10, 1939. The Court stated:

"However, the Federal Rules had not been in operation for a long period when the action was brought, and many were not familiar with all their requirements and did not realize that they would replace the State Rules of Procedure in a removed case."

There are cases, however, to the contrary which hold that jury trial as a matter of right is waived by failure to serve demand for jury trial. *Suffin vs. Springer et al. District Court, Southern District, New York*, 1 F. R. D. 245. Also, *Hoffman, Inc. vs. Textile Mach. Works, District Court of Pennsylvania*, 27 Fed. Supp. 431.

In *Wardrep vs. New York Life Ins. Co.*, District Court, Eastern District Tennessee, 1 F. R. D. 175, the Court held:

"In cases removed from state court in which the pleadings were so framed as to entitle plaintiff to jury trial, plaintiff need not again, within ten days after last pleading directed to such issue, or a any time again, demand jury trial."

In this case the Court held in substance that there had been no express waiver of the right of jury trial and the pleadings in the state court before removal had expressly demanded the right to trial by jury.

At least in one instance a United States District Court sustained the right of co-defendants to have a jury trial even though the main defendant had not requested same and the holding was to the effect that the main defendant was entitled to the benefit of a jury trial because of the request of the co-defendant.

In the case of *United States Fidelity & Guaranty Co. vs. Nauer, et al*, 1 F. R. D. 547, District Court of Massachusetts, this was an action by the insurance company against the insured, Nauer, for cancellation of policy of motor vehicle insurance on the grounds of fraud in the procurement of the policy. The co-defendants, Kilroy and McCollem, were

plaintiffs in State Court actions against Nauer as a result of an automobile accident involving Nauer's car. Co-defendants demanded a trial by jury by filing the usual request. Plaintiff then filed a motion requesting the court to find that a right of trial by jury did not exist and for a trial of the action by the court without jury.

In denying the motion of the plaintiff, Judge Sweeney said:

"When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

"Rule 57 of the Rules of Civil Procedure provides: 'The procedure for obtaining a declaratory judgment * * * shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39'."

"The Declaratory Judgment Act * * * shows clearly that it neither intended to enlarge or destroy the right to trial by jury." Citing, *Aetna Casualty & Surety Co. v. Quarles*, 92 F. 2d 321.

The Court held:

"Where insurer under automobile policy filed petition in District Court against insured and co-defendant who were plaintiffs in a State Court action against insured, and co-defendants demanded a trial by jury in action for declaratory judgment, insured was entitled to benefit of co-defendants' claims under Federal Rule concerning trial by jury."

The right to jury trial in action for declaratory judgment has been upheld in other cases. See *Pacific Indemnity Co. v. McDonald* 107 F. 2d. 446. (*American Lumbermen's Mutual Casualty Co. of Illinois vs. Timm & Howard Incorporated, et al*, 108 F. 2d 497.

RULE 50. MOTION FOR A DIRECTED VERDICT

The proper procedure under this Rule has been so ably stated by Mr. Justice Roberts in *Montgomery Ward & Company v. Duncan*, 311 U. S. 243, 85 Law Ed. 132, that any attempt to restate it here except in the exact

language of the learned Justice, would be ineffectual.

This case arose in the Eastern District of the United States District Court for the District of Arkansas. It was an action for injuries sustained by an employee of the defendant pursuant to the fellow servant law of Arkansas.

At the close of the evidence, the defendant moved for a directed verdict which was denied and the jury returned a verdict in favor of the plaintiff for \$16,500.00 and judgment was entered thereon. Within ten days thereafter, defendant moved for judgment pursuant to Rule 50 (b) in accordance with its motion for a directed verdict and prayed for a new trial in the alternative. The court granted the motion and ordered that the verdict and judgment previously entered be set aside, entered judgment for the defendant in accordance with its motion for a directed verdict, notwithstanding the aforesaid verdict, and for costs. No action was taken on defendant's motion for new trial.

From this order and judgment, the plaintiff appealed to the Eighth Circuit Court. The Eighth Circuit Court held that it was error for the trial court to set aside the verdict and direct a verdict for the defendant, holding, in effect, that the facts were sufficient to take the case to a jury and remanded the case with directions to the trial court to re-instate the verdict of the jury and the judgment entered thereon.

Counsel for Montgomery Ward & Company, before the Circuit Court of appeals, raised the following question:

"What, in such a case, becomes of the motion for new trial when the case is remanded?

In answer to this question the Circuit Court said:

"Strictly speaking the motion did not pray for relief in the 'alternative,' giving the court a choice between two propositions either of which he might grant in the first instance. The court was asked to rule on the motion for a new trial only 'in the event he refused to set aside the verdict * * * and judgment * * *.' The court having granted the prayer of the motion as made did not err in not ruling on the motion for a new trial. The condition on which the court was asked to grant a new

trial did not come into existence. * * * The order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial; and the latter motion passed out of the case upon the entry of the order."

Certiorari was granted by the Supreme Court of the United States for a review of the action of the Circuit Court of Appeals. (309 U. S. 650) Mr. Justice Roberts for the court said:

"The importance of a decision by this court, respecting the proper practice under Rule 50 (b), and a conflict of decisions, moved us to grant certiorari."

The Court further said:

"The defendant contends that the rule continues the existing practice respecting granting of new trials, and also regulates the procedure for rendering judgment notwithstanding a verdict; that the provision for an alternative motion for a new trial would be meaningless and nugatory if the granting of the motion for judgment operated automatically to dismiss it, since the bases of the two motions are, or may be, different, and orderly procedure requires that the court first rule on the motion for judgment, the granting of which renders unnecessary a ruling upon the motion for a new trial, which should be reserved until final disposition of the former."

"The plaintiff insists that the trial court is limited to a choice of action on one motion or the other, but cannot rule upon the motion for judgment and leave that for a new trial to be disposed of only if judgment notwithstanding the verdict is denied."

"The motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment. It put forward claims that the verdict was against the weight of the evidence and was excessive; that the court erred in rulings on evidence and in refusing requested instructions. An affirmative finding with respect to any of these claims would have required a new trial whereas none of them could be considered in connection with the motion for judgment."

"2. We come then to the substantial question which moved us to issue the writ, namely, whether under Rule 50 (b) the District Court's grant of the motion for

judgment effected an automatic denial of the alternative motion for a new trial. We hold that it did not.

"The rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other. Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict."

"A motion for judgment notwithstanding the verdict did not, as common law, preclude a motion for a new trial."

"Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence of instructions to the jury.

"We are of opinion that the provision of the rule, 'A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative'—does not confine the trial judge to an initial choice of disposing of either motion, the exercise of which choice precludes consideration of the remaining motion. We hold that the phrase 'in the alternative' means that the things to which it refers are to be taken not together but one in the place of the other."

"The grounds assigned for a new trial have not been considered by the court. In the circumstances here disclosed the uniform practice in state appellate courts has been to remand the case to the trial court with leave to pass upon the motion for new trial."

"This case well illustrates the efficacy of the procedure sanctioned by the ruled. In view of the trial judge's conclusion that the plaintiff failed to make out a case for the jury he would, under the earlier practice,

simply have granted a new trial. Upon the new trial, the judge, if his view as to the law remained unchanged, would have directed a verdict for the defendant. The only recourse of the plaintiff would have been an appeal from this second judgment. If the appellate court had been of the view it here expressed, it would have reversed that judgment and remanded the case for a third trial. Upon such third trial, if the trial court had ruled upon the evidence and given the instructions to which the defendant objects a judgment for the plaintiff would have been the subject of a third appeal and if the defendant's position were sustained by the appellate court, the cause would be remanded for a fourth trial at which proper rulings would be rendered and proper instructions given."

"In the circumstances, we think the failure of the District Court to rule in the alternative on both matters can be cured without depriving the defendant of opportunity to have its motion for a new trial heard and decided by the trial court, by modifying the judgment below to provide that the cause be remanded to the District Court to hear and rule upon that motion."

While this is not an insurance case, it is very worthy of consideration here because of the decision of the Supreme Court of the United States affecting the procedure under this Rule and which no doubt will be strictly followed by the District Courts hereafter when this Rule is invoked.

RULE 52 (a) (b) FINDINGS BY THE COURT—AMENDMENT

Like its predecessor, Equity Rule 70½, this Rule is intended to aid appellate courts by affording them a clear understanding of the basis of the decisions below. Conflict has arisen in some of the courts as to whether or not the appellate court is bound by the findings of the lower court in "the court's findings of facts."

In *Cherry-Burrell Co. v. Thatcher*, 107 Fed. (2nd) 65, the Ninth Circuit Court of Appeals held:

"The Circuit Court of Appeals cannot set aside the findings of the trial court on conflicting evidence unless they are clearly erroneous."

The Court said, in part:

"This is simply a case of a conflict in

the evidence and the court below reached its conclusion by determining the weight of the evidence and the credibility of witnesses. Giving due regard to the opportunity of the trial court to judge of the credibility of the witnesses as we are required to do, * * * * We cannot therefore set aside the findings."

Likewise, in *American Home Fire Assur. Co., et al. v. Hargrove, et al.*, 109 Fed. (2nd) 86, the Tenth Circuit Court held:

"Findings supported by substantial evidence and not clearly erroneous must stand on appeal."

In *Lumbermen's Mut. Casualty Co. v. McIver*, 110 Fed. (2nd) 823, the Ninth Circuit Court held:

"The Circuit Court of Appeals could not disturb findings of fact of District Court unless findings were clearly wrong."

However, a different construction of Rule 52 (a) resulted from the decision of the Eighth Circuit Court in *State Farm Mut. Automobile Ins. Co. vs. Bonacci, et al.*, 111 Fed. (2nd) 412. Judge Gardner for the Court said:

"It is urged that we are bound in this case by the findings of the lower court on these issues. Rule 52 (a) of the Rules of Civil Procedure."

"The rule plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings. If this were not true, the provision that requests for findings are not necessary 'for the purpose of review' would be meaningless. If the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses."

"Under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the special qualifications of the trial judge to pass on credibility."

In *Hecht, Levis & Kahn vs. New Zealand Ins. Co.*, 1 Fed. Rules Decisions, 593, it was held by the District Court of the Second District of New York:

"The federal rule providing for special findings of facts and conclusions of law in actions tried without jury is 'mandatory.' The Court said: (Page 594)

"This rule was adopted from former Equity Rule 70½, 28 U. S. C. A. following section 723. The distinction made under the Federal Rules of Civil Procedure is between jury and nonjury actions, not actions at law and suits in equity, as formerly. Findings were mandatory under former Equity Rule 70½. *Interstate Circuit v. United States*, 304 U. S. 55, 58 S. Ct. 768, 82 L. Ed. 1146. The Language of Rule 52 (a) is also mandatory. Defendant intends to appeal the verdict and I feel that it is my duty to resolve any doubt as to the necessity of findings, in favor of a complete record on appeal, so as not to prejudice defendant's right to a proper review in the appellate court. I have concluded that findings of fact and conclusions of law should be made, before any judgment is entered herein."

It will be noted that (a) of the Rule provides:

"Requests for findings are not necessary for purposes of review."

It would seem better practice, however, for counsel to request findings, not only to aid the trial court but also that the appellate court may have a clear understanding of the basis for the decisions below.

RULE 56 (a) (b) (c) SUMMARY JUDGMENT—FOR CLAIMANT—FOR DEFENDING PARTY—MOTION AND PROCEEDINGS

The summary judgment procedure prescribed in Rule 56 is a procedural device for promptly disposing of actions in which there is no *genuine issue* as to any material fact. The purpose of the Rule is to eliminate a trial in such cases and the very object of the motion is to separate what is formal or pretended in the denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.

The court is even authorized to examine evidence not for the purpose of trying an issue, but to determine whether there is a genuine issue of fact, proper for trial. If there be no genuine issue of fact in controversy, the parties are not entitled to a trial and the court, applying the law to the undisputed material facts, may render a summary judgment. However, if there be a genuine issue as to a material fact, the case must go to trial. In case of the latter, it is the duty of the court to sift the issues and to specify which material facts are really in issue, thereby facilitating and expediting the trial.

It has been held that this pre-trial sifting of the issues upon a motion for summary judgment is quite similar to the pre-trial procedure, Rule 16.

A summary judgment may often be rendered in actions for a declaratory judgment since the facts are frequently not in dispute and the court may decide the case summarily by applying the law. It is said that a claimant may make a motion for summary judgment only after a pleading has been served in response to the pleading in which the claimant's claim is stated, thereby permitting the issues to be formed. There is authority, also, holding that a defending party may have summary judgment at any time after a pleading stating a claim against him is served upon him and that he is not required to serve his responsive pleading first.

However, this was not the holding in *Hooven, Owens, Rentschler Co. et al, vs. Royal Indemnity Co.*, 1 F. R. D. 526. In this case, defendant was in default of pleading and was allowed an additional ten days to plead. However, the first pleading filed by the defendant was a motion for summary judgment, pursuant to Rule 56. Defendant did not file the answer required by the order of the court. The plaintiff then filed a motion to require the defendant to answer prior to hearing on defendant's motion for summary judgment. The court said:

"Plaintiff insists that until an answer has been filed, such a motion for summary judgment is a useless gesture which cannot lawfully be granted by the court and which will produce nothing of substantial benefit to either party."

The Court required the defendant to file its answer and stated:

"When an answer has been filed defendant, if it wishes, may re-file its motion for summary judgment. * * * It is the view of the court that this course will, in the end, expedite the disposition of the cause and remove from the case any further need for consideration at some future time of the question presented by the motion filed on behalf of the plaintiffs."

It has been stated that a typical instance where a defendant may move for summary judgment before serving his answer is when he admits the facts stated in the complaint but asserts the Statute of Limitations as a defense. The Rule expressly provides that the court may render a summary judgment when no issue as to any material facts exists, except as to the amount of damages and the moving party is entitled to a judgment as a matter of law.

The rule was applied in *Rabe vs. Metropolitan Life Insurance Co.*, by the District Court of Massachusetts, 1 F. R. D. 391, where the court held:

"In action on life policy issued in 1923 where insured died in 1934 and last premium payment was made in 1924, at which time policy had no cash surrender value, and beneficiary did not allege or offer proof of total and permanent disability of insured resulting in waiver of premiums in accordance with terms of policy, defendant's motion for summary judgment would be granted."

In an action for declaratory judgment, in *Mutual Life Ins. Co. of N. Y. vs. Ballard, et al*, 1 F. R. D. 180, the court sustained insurance company's motion for summary judgment and held as follows:

"In action for declaratory judgment to determine insurer's liability under disability provision of life policy, the cause was ripe for determination on insurer's motion for summary judgment where court was convinced that should cause be permitted to go to trial on issue of insured's liability issue could not be submitted to jury."

The trial court said:

"The court is of the opinion that this cause is ripe for determination under Rule 56 inasmuch as the court is convinced that should this case be permitted to trial as requested by defendant on the issue of in-

sured's disability, that said issue could not be submitted to a jury but that a verdict would necessarily be instructed for the plaintiff."

Motion for summary judgment was granted in a novel case, *Whiteman vs. Fed. Life Ins. Co.*, U. S. District Court, Western District of Missouri, 1 F. R. D. 95. In this case, the widow and administratrix of the deceased, Whiteman, (the latter, prior to his death, was a conductor on the Santa Fe Railroad), brought suit against the Federal Life Insurance Company on an accident insurance policy.

It was proven by the pleadings that the deceased, Whiteman, was a conductor on the Santa Fe Railroad and was, therefore, an employee of a steam railroad, which class of persons was specifically excluded from the coverage of said policy. It was claimed by the plaintiff that the deceased sustained an accident resulting in a cerebral hemorrhage from which he died, that the reason for the cerebral hemorrhage was the fluctuating temperatures that the deceased was exposed to because of the failure of the air conditioning apparatus on one of the cars of the train of which the insured was a conductor.

The court pointed out that:

(a) It did not believe that the plaintiff could prove that exposure to fluctuating temperatures was an accident;

(b) That by the very exclusionary clause in the policy, the deceased was an employee of a steam railroad.

The court stated that the pleadings of the plaintiff showed that deceased was an employee and that the court took judicial notice that the Santa Fe was a steam railroad.

In granting the motion of the defendant for summary judgment, the court said:

"Motion for summary judgment should be sustained only in a very clear case in which there is no doubt concerning answer to some question so essential that when it is resolved adversely to one of the parties that party cannot prevail."

The denial of a motion for summary judgment should not be regarded as appealable. Clearly it is not a final judgment because it does not dispose of the case.

In *Jones vs. St. Paul Fire & Marine Ins.*

Co., C. C. A. Fifth Circuit, 108 Fed. (2nd) 123, it was held:

"Refusal of summary judgment, like overruling of motion to dismiss action, is not 'final judgment,' as case still stands for regular trial, so that no appeal lies from such refusal."

RULE 57. DECLARATORY JUDGMENTS

It seems that the purpose of Rule 57 is to bring within the scope of the Federal Rules, the procedure for obtaining a declaratory judgment. Formerly, an action for declaratory judgment was frequently docketed on the equity side of the court. It is now, however, a civil action.

The Rule also makes more explicit the alternative character of the remedy and provides, in addition, for speedy hearings when applied for.

The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties.

When declaratory relief will not be effective in settling the controversy, the court may decline to grant it but the fact that another remedy would be equally effective affords no ground for declining declaratory relief.

Under the Federal Declaratory Judgment Act, declaratory relief is confined to "cases of actual controversy" for the purpose of declaring the "rights and other legal relations of any interested party." No new substantive rights or duties have been granted by the Rule but it simply provides a new method for their determination.

According to Rule 57, the declaratory judgment is a civil remedy and subject to the procedural regulations set out in the Federal rules.

A complaint for declaratory judgment should be dismissed if no justifiable controversy is presented and merely an advisory opinion is sought.

A leading case prior to the Rules and very frequently cited is *Aetna Life Insurance Co. vs. Haworth*, 300 U. S. 227, 81 Law Ed. 617. In this case, it was held by the Court:

"1. The Federal Declaratory Judgment Act of June 14, 1934 (48 Stat. at L. 955, 28 U. S. C. 400), in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional limitation of the exercise of judicial power to 'cases' and

'controversies' and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition."

"3. A 'controversy,' in the sense in which the word is used in the Constitution in defining the judicial power of the Federal courts, must be one that is appropriate for judicial determination as distinguished from a difference or dispute of a hypothetical or abstract character, or from one that is academic or moot; must be definite and concrete, touching the legal relations of parties having adverse legal interests; and must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

"5. A proper subject for the rendition of a declaratory judgment is presented where an insured is claiming that he has become totally and permanently disabled and therefore, by the terms of his life insurance policy, relieved of the obligation to continue the payment of premiums."

A few typical and well-reasoned cases, we believe, will be sufficient to present the interpretation by the courts of this Rule (57).

Maryland Casualty Company vs. Pacific Oil & Coal Co. and Joe Orteca, 312 U. S. 156, 85 Law Ed. 445. In this case, the Maryland Casualty Company issued a conventional liability policy to the insured, Pacific Oil & Coal Company, in which it agreed to indemnify the insured for any sums latter might be compelled to pay to third parties for injuries to person and property caused by automobiles *hired by the insured*. It further agreed that it would defend any action covered by the policy which was brought against the insured to recover damages for such injuries.

While the policy was in force, a collision occurred between an automobile driven by Orteca and a truck driven by an employee of the insured. Orteca brought an action in the State court of Ohio against insured to recover damages. The Maryland Casualty Company then brought this action against insured and Orteca and its complaint set forth, among other things, that the employee of the insured was driving a truck *sold to him by the insured on a conditional sales contract and not a truck hired by the insured* and hence it was not liable to defend the action

brought by Orteca against the insured nor indemnify the latter if Orteca prevailed. It sought a declaratory judgment and asked for a temporary restraining order in the case in the state court. Orteca then demurred to the complaint for declaratory judgment and the United States District Court for the District of Ohio sustained the demurrer.

On an appeal to the Circuit Court of Appeals, (111 Fed. 2nd 214), the action of the District Court was affirmed. Certiorari was granted and the matter came on before the Supreme Court of the United States for review. Mr. Justice Murphy for the Court said:

"The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed for in its complaint. This raises the question whether it is an 'actual controversy' within the meaning of the Declaratory Judgment Act."

"That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which latter claims is covered by the policy (citing sections of Ohio Statute) which give Orteca a statutory right to proceed against petitioner (Casualty Company) by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within 30 days after its rendition."

"It is clear that there is an actual controversy between petitioner and the insured."

"Thus we hold that there is an actual controversy between petitioner and Orteca and hence that petitioner's complaint states a cause of action against the latter."

The court, however, refused to authorize the issuance of the injunction prayed for by petitioner. The judgment of the Supreme Court of the United States was that the judgment of the Circuit Court of Appeals be reversed and the cause remanded for further proceedings in conformity with the opinion.

Maryland Casualty Co. vs. Consumers Finance Service, Inc., 101 Fed. (2nd) 514, 3 CCA. "A controversy between insurer and insured as to extent of former's responsibility under insurance policy involves insurer's rights and will support declara-

tory judgment proceeding by insurer."

"A declaratory judgment may not be refused merely on ground that another remedy is available, nor because of pendency of another suit, if controversy between parties will not necessarily be determined therein."

The Maryland Casualty Company issued a policy to the defendant in which it was stipulated "that no person or organization or any agent or employee thereof operating an automobile repair shop, public garage, sales agency, etc., should be deemed insured with respect to any accident arising out of the operation thereof." The Finance Service was engaged in the business of financing motor vehicles. It directed one of its employees, Smith, to go to the premises of one Hanshulak to repossess an automobile to which it was entitled. Smith was directed to turn the car over to one Feldman, a dealer in used cars. Smith picked up one Huddy, an employee of Feldman, and they drove to the home of Hanshulak to get the automobile and the car was turned over to Huddy, the employee of Feldman, who on his way to Feldman's place of business, had an accident, injuring several persons. One of these persons instituted suit against the Finance Service Company to recover for his injuries and the others threatened suit, whereupon the Finance Service made demand upon the Casualty Company to defend it from such suit. This the Casualty Company refused to do, contending that it had no responsibility under its policy with respect to this accident since both Smith and Huddy were at the time of the accident on the business of Feldman, who operated a sales agency. The Casualty Company then filed petition for declaratory judgment in which it named insured and all of the persons injured. Its petition was dismissed by the District Court of the Middle District of Pennsylvania, whereupon the Casualty Company appealed to the Circuit Court of Appeals. The Court said:

"It is settled that a controversy between an insurer and its insured as to the extent of the insured's responsibility under the insurance policy involves the rights of the insurer and will support a declaratory judgment proceeding. (Citing Aetna Life Ins. Co. vs. Haworth, 300 U. S. 327, and other cases.)"

"The controversy in which the Casualty

Company is involved is solely between Finance Service and itself. It involves the extent of the coverage of the policy and not the liability of the Finance Service to the persons injured in the accident."

"We conclude that the court below exceeded its discretionary power in dismissing the petition for declaratory judgment."

However, in *American Automobile Insurance Co. vs. Freudnt, et al*, 103 Fed. (2nd) 613, 7 C. C. A., the court dismissed insurance company's complaint for declaratory judgment which was brought subsequently to an injured person's obtaining judgment in the state court against the insured as the result of an automobile accident.

The question sought to be determined by the declaratory judgment suit was whether or not the provision in the policy covering "hired automobiles" extended to the automobile of the insured which injured the plaintiff. After the judgment was obtained and before the declaratory judgment complaint was filed, garnishment proceedings were threatened against the insurance company. The district court dismissed the declaratory judgment complaint and this action was affirmed by the Circuit Court of Appeals, which said:

"In the instant case, the duty or right of the insurer to participate in the defense of the suit against the insured is not involved since such suit already has gone to judgment without objection by the insurer. The only remaining question in which the insurer is interested is whether the judgment creditor can rely upon the contractual obligation of the insurer to protect the insured. Under the law of Illinois as applied to the facts in this case, this question can be adjudicated in the pending suit against the insured."

The Sixth Circuit Court of Appeals, in *Employers' Liability Assur. Corp. vs. Ryan, et al*, 109 Fed. (2nd) 690, held that there was an "actual controversy" and reversed the action of the trial court in dismissing insurance company's complaint for declaratory judgment. The Court said:

"An action by apartment house owners' liability insurer against insured and injured partly for declaratory judgment was not dismissible because of insurer's failure to

intervene in damage suit against insured and join issue with insured on policy coverage and failure of notice, under circumstances."

The insured may bring an action for declaratory judgment to establish rights under disability benefit provision of life policy as well as the insurer. *Mutual Life Ins. Co. of N. Y. vs. Drummond III Fed. (2nd) 282.*

In *Lumbermens Mutual Casualty Co. vs. McIver, et al*, 27 Fed. Supp. 702, it was held:

"Where the existence of a policy at the time of loss has been admitted and compliance therewith alleged the burden of proving affirmative matter constituting a special defense rests on the insurance carrier."

One of the fundamentals of declaratory judgment proceedings is that all parties interested in the controversy be brought into the case with the object of settling the controversy in all its varied ramifications. *Mutual Life Ins. Co. of N. Y. vs. Benton*, 1 FRD 151.

The foregoing cases illustrate the trend of judicial interpretation of Rule 57. If time and space permitted, many other cases, some of which are extremely novel, could be analyzed herein but the writer feels that the foregoing is sufficient for the purpose of this paper.

RULE 82—JURISDICTION AND VENUE UNAFFECTED

The effect of this rule has been discussed heretofore rather generously under the subject "third party practice".

The conflict in authority in the Federal Courts has been fully discussed therein and the question of venue is still debatable and has not been uniformly and finally settled.

CONCLUSION

While all the Rules have not been covered in this article, it is hoped that the members of this Association will have benefited to some extent at least by the foregoing analysis and the judicial interpretation of the courts on such Rules.

Meeting Medical Proof

By ROBERT E. DINEEN
Syracuse, New York

ANY trial lawyer with experience knows that there are no hard and fast rules for meeting medical proof. No two cases are alike, and what may be effective in one case may be ineffective in another. Remedies and procedure available in one State may be lacking in others. Consequently, in this monograph, the discussion will be confined to general observations on the subject and limited to New York law.

The first step in the successful defense of medical claims is to ascertain two things: first, what the plaintiff claims; and second, what the facts are.

Under New York law, the defendant in a personal injury case is entitled to compel the plaintiff to particularize his claim for damages. The items to which the defendant is entitled are defined by statute, or rather by

rule (Rules of Civil Practice, Rule 116). The plaintiff must supply the defendant with:

- (1) A statement of the injuries and a description of those claimed to be permanent.
- (2) The length of time confined to bed and house.
- (3) The length of time incapacitated from employment.
- (4) The total amount claimed as special damages for:
 - (a) Physician's services and medical supplies.
 - (b) Loss of earnings.
 - (c) Hospital expenses.
 - (d) Nursing services.

It goes without saying that no lawyer should proceed to trial without this informa-

tion, particularly since it can be had for the asking. Our statute (Civil Practice Act, Section 306) specifically requires the plaintiff to submit to a physical examination and, wherever possible, this physical examination should be deferred until the bill of particulars has been served; where this procedure is followed, the medical examiner can be supplied with a copy of the bill and has the advantage of knowing exactly what the plaintiff claims when he is examining him.

In our section of the State, we encounter a peculiar phenomenon—the use of unverified complaints. Under our rules, if the complaint is not verified, the bill of particulars need not be (Rules of Civil Practice, Rule 117). It is not uncommon to confront a plaintiff on the witness stand with the original summons and complaint or the original bill of particulars and receive the truthful answer that the witness has never seen or read either one of them and does not have the faintest idea of what they contain. Some of our more hardboiled plaintiff's attorneys followed the practice of using so-called shotgun complaints, in which every conceivable injury is alleged, and when a motion or demand for bill of particulars was made, the injury clause in the complaint was lifted bodily to the bill of particulars. This made it almost impossible to hold the plaintiff down to any particular claim and markedly impaired the value of a bill of particulars. This situation has now been remedied by a decision of the Appellate Division, Fourth Department (*Jones vs. Jay-Cobbs, Inc.*, 251 A. D. 878), which places the burden squarely upon counsel for the plaintiff, as distinguished from the plaintiff himself, to supply the necessary information.

It is self-evident that a bill of particulars, particularly an unverified one, cannot be the complete solution to the problem of ascertaining what the plaintiff claims. In cases of any consequence, the medical examiner is requested to ascertain and embody in his report not only what the plaintiff claims, but also what his attending physician claims. Experience has demonstrated that there is frequently a wide difference between the two. It is a common occurrence to discover unscrupulous doctors joining forces with some of our less worthy brethren in the law for the purpose of "building a case up," sometimes with the collaboration of the patient and sometimes without it. Information along this

line is not only helpful in trying a case but also in appraising its value. Thus, if the plaintiff alleges in the complaint and bill of particulars that an underlying heart condition was aggravated as a result of the accident and the claimant's attending physician advances that claim to your examiner, the case may have one value, whereas if the attending physician assures your examiner that the accident in no way affected the heart condition, the case has quite another value. Moreover, a competent examiner can frequently ascertain the strength or weakness of the attending physician's convictions or the reason for his convictions or lack of them. As you can readily see, this information is very useful when the time for cross-examination of the attending physician arrives.

We come now to the subject of medical histories. We all know that in many cases the history is all important. If our examiner is a careful practitioner, his report may be very complete in that regard. Most of us find, however, that for every report which contains a complete medical history, there are half a dozen which are sketchy and incomplete. There are any number of reasons why this is so. Many busy examiners are unwilling to take the time to obtain a complete history. Others are naturally careless. Sometimes the patient intentionally conceals his history or some part of it, and rather than precipitate any unpleasantness during the examination, the doctor abandons the inquiry. Even when the history is complete, it suffers from another shortcoming; it is not under oath and if the claimant should find it expedient at the time of trial to change his history, it is a comparatively simple matter for him to assert that the defendant's medical examiner made a mistake in obtaining the history.

Our New York Civil Practice Act provides us with a simple procedure which obviates all of these difficulties. We refer to the oral examination of the plaintiff before trial in conjunction with the physical examination under Section 306 of the Civil Practice Act. It might be observed in passing that for some unknown reason, this practice is widely used in some parts of the State and practically unheard of in others. In interpreting this section, the Court of Appeals, in one of the leading cases (*Lyon vs. Manhattan Railway Co.*, 142 N. Y. 298, 305) said:

"Moreover, how is it possible for medical experts to make a physical examination in a case like this, or indeed in most cases, by merely observing the external marks or indications of personal injury or disease? The term itself not only implies such observation, but an inquiry by means of questions and answers as to the *cause, nature, character and extent of the disability*. Mere external appearances are, in themselves, of no consequence unless identified and connected with the accident as the cause, and, hence, disclosures such as ordinarily occur between patient and physician must necessarily accompany the inspection of the injured parts."

To take advantage of this Section, a simple motion can be made and is granted almost pro forma. A Referee, usually a lawyer, is appointed, the claimant is sworn and a stenographer is supplied to record the examination. The widest latitude is allowed with one exception; no inquiry into the elements of negligence which precipitated the accident is permitted. When the examination is over and the minutes are transcribed, the plaintiff is required to sign them. The advantages of this procedure are innumerable. First, the history is a matter of record and cannot be changed; next, it is more apt to be complete; third, it is difficult for the claimant to conceal or distort the history without perjuring himself. It has an advantage over and above these; it enables the trial lawyer to make first-hand observations of the plaintiff well in advance of the trial and to know what he will be confronted with at the trial. Incidentally, we have found from our own experience, and other lawyers in our section tell us the same thing, that these examinations, which are usually held in the office of the defendant's attorneys, frequently lead to the settlement of cases.

In New York State we are looking forward with interest to a new method of acquiring information about the contents of hospital records. Our statute (Civil Practice Act, Section 352) has the effect of making that portion of hospital records showing the nature of the illness, the medical treatment given, the diagnosis and the results of X-ray interpretations, privileged (*Lorde vs. Guardian Life Insurance Co.*, 252 A. D. 646.) In 1936, however, an amendment was made to the Lien Law authorizing so-called hospital

liens in personal injury cases (Section 189). Subdivision 5 of Section 189 reads as follows:

"Any person or persons, firm or firms, corporation or corporations legally liable for such lien or against whom a claim shall be asserted for compensation for such injuries, shall be permitted to examine the records of any corporation or other institution or body maintaining such hospital in reference to such treatment, care and maintenance of such injured persons."

This provision is at war with the provision of the Civil Practice Act restraining the hospital from divulging information, and only time will tell how the Courts will reconcile this conflict. Suffice to say, many hospitals, particularly those who are taking advantage of the new provisions of the Lien Law, are making this information, which was heretofore confidential, available to the defendant.

Time does not permit observation on other routine steps, such as the neighborhood check-up, etc., but there is one simple step which is well worth mentioning. I refer to the checkup with the claimant's employer to determine the actual length of time the claimant was away from his business. For some reason or other, many claimants insist on enlarging on this item and their attending physicians fall into the same error. There is nothing that will discredit a claimant or a doctor more effectively than evidence from the employer, usually in documentary form, that the claimant was actually working at a time when the claimant and his attending physician said that he was disabled and unable to work.

There are certain steps in the preparation of a defense upon a medical proposition which it will do no harm to state at this time. I refer first to the process of acquiring medical knowledge on the subject to be litigated. Too many lawyers make the mistake of acquiring their medical knowledge the easy way—that is, by attempting to absorb it from conversation with their medical examiner or, in the event that they do undertake to do some reading on the subject, by confining it to so-called attorneys' textbooks on medicine. All too frequently the doctors are not up to date on the subject. They are relying on their general knowledge of the subject or, worse still, what they can remember of the instruction they received in medical school. We all know the shortcomings of textbooks on com-

mercial law—the field is so broad that it could not possibly be encompassed in a single volume with accuracy. Attorneys' textbooks on medicine suffer from the same infirmity. True it is that they give a general idea on the subject, and if you happen to know that the plaintiff's attorney gets his information from sources of this type, it may give you an idea of what to expect. Experience has demonstrated, however, that the most satisfactory way to acquire knowledge in some particular field of medicine is to arm yourself with the following tools:

- (a) The standard authorities on the subject.
- (b) A standard textbook on anatomy, such as Gray's or Cunningham's.
- (c) A standard medical dictionary, such as the American Illustrated Medical Dictionary.

Frequently it is advisable to prepare a summary or synopsis of what the different authorities have to say on the subject. It is helpful to append to this summary a glossary of the medical terms encountered. This glossary should include the spelling of all unfamiliar medical words, the pronunciation of the word, and its meaning. If you will take the time to check each unfamiliar word and add it to your glossary as you go along, you will find your stock of medical knowledge increasing in leaps and bounds. The task is not as laborious and time-consuming as it sounds, for usually the point involved can be narrowed down to some single issue. All of this should be done *before* the customary pre-trial conference or conferences with your medical witnesses. It will enable you to better absorb their ideas and to direct the inquiry into phases of the matter that they have not mentioned or may have overlooked. It has another advantage; it provides you with the knowledge to cross-examine doctors on the opposing side, using the textbook as the basis for the cross-examination, after, of course, you have first laid the necessary foundation by obtaining an admission from the witness that he recognizes the author of the work as an authority in that field (*Egan vs. Dry Dock Co.*, 12 A. D. 556). It is particularly important to follow this practice in the defense of malpractice cases. In such cases, the doctor or dentist, as the case may be, usually feels that his reputation is at stake. He will expect the lawyer engaged by his insurance

carrier to "know his stuff." It is ill-advised for the lawyer to be groping his way medically or displaying his ignorance before his client, and this is as true of the pre-trial conference as it is during the trial. If the case is lost and the doctor is looking for an alibi, the lawyer is frequently selected as the victim, and justifiably so if he has confined his efforts in acquiring his medical knowledge to absorbing it "by ear." A word of caution, although it is hardly necessary to give it to this assemblage of veterans. Just because you have labored to acquire a sizeable stock of medical knowledge is no reason why you should display it in the courtroom—and above all things, remember; no matter how much studying you have done on the subject, it is a safe assumption that you still do not know as much about it as the doctors do.

There is one other step in advance of the trial which I regard as of some importance; namely, to ascertain, if possible, the character and background of any physicians whom you expect will be called to testify by the other side. It is always easier to cross-examine a medical witness if you are forewarned as to his propensities. Most trial lawyers have the faculty of being able to "size up" a witness and can usually sense whether they may plunge in boldly or must tread cautiously. I make the point that there is no need of relying upon your ability to appraise human nature when, by a few inquiries made in advance of the trial, you can ascertain almost with certainty what you are going to encounter. Incidentally, if you are scheduled to cross-examine one of the big names in medicine, you will probably find that at some time or other in his career your potential witness has contributed to the literature. It is a comparatively easy matter to trace these contributions, particularly through the libraries of the American Medical Association and the American College of Surgeons. Usually your own medical consultants have access to this material and can secure copies of the contributions, which may or may not be helpful for the purpose of cross-examination. If your prospective witness is a lesser luminary in the medical field, it is frequently possible, particularly in the smaller counties, to run through the minutes maintained by the Clerk of the Court, in which the names of the witnesses are incorporated. This procedure frequently results in turning up evidence which the doctor may have given in some previous trial, which can be used for the

purpose of impeaching or contradicting him in your case.

The last of the pre-trial steps is to carefully read and digest the allegations of injuries set forth in the complaint and bill of particulars. It has been held in our State (*Keeffe vs. Lee*, 197 N. Y. 68, 70) that:

"Where a person alleges and proves that he has been injured in his person the law implies that damages result from such injury, and he may recover such damages as necessarily, usually and immediately flow therefrom, under a general allegation in the complaint that damages have been sustained by him by reason of such injury. * * * If a person seeks to recover damages other than such as necessarily, usually and immediately flow from the injury he must allege such special damages and prove them."

If a lawyer is thoroughly conversant with the allegations set forth in the complaint and bill of particulars and is alert throughout the trial, he will frequently be in a position to exclude evidentiary proof as to items of injuries or damage not covered by the complaint.

Some of you may feel that I have stressed unduly the subject of preparation in advance of the trial. It is my personal opinion, however, that courtroom experience can never be a substitute for adequate preparation of a medical defense.

This brings us to the trial itself, and it is at this point that courtroom experience becomes helpful and indeed necessary. Before undertaking to cross-examine any medical witness, the potential cross-examiner should always ask himself; has the witness testified to the facts substantially as they are? If he has, there is usually little to be gained by interrogating him further. Cross-examination under such circumstances simply results in repeating what the witness has said in his direct examination and emphasizing it—something you were not engaged to do. If you have satisfied yourself that the witness has departed from the truth, either intentionally or otherwise, the next inquiry is; can the falsity or erroneousness of the evidence be developed by cross-examination? There is nothing that is more damaging than a futile or ineffective cross-examination of a medical witness. Every trial lawyer can recall occasions in his own career where a cross-examination was a fail-

ure because the cross-examiner was no match for the witness. If the witness is experienced and ingenious, it is sometimes more effective to cross-examine him about being an expert and the fee he will receive therefor than it is to interrogate him about medical subjects. Where the medical witness is truthful or has unintentionally made an error, the cross-examination then simmers down to a question of individual judgment in each case, a field of discussion which it would serve no useful purpose to review in this monograph.

There are one or two other practices which are sometimes helpful in minimizing the effect of medical evidence. In fracture cases, it is usually helpful to develop on cross-examination the role which nature plays in mending fractures, and to point out, if it be a fact, that solid, bony union has occurred. In fracture cases, there is a great tendency to stress the existence of the fracture and sometimes the fact that the fracture has healed is all but overlooked. It is helpful upon occasion to develop, if possible, from the attending physician that the injury in question is a common one and that he has seen many cases of that type. The cross-examiner can also develop that in treating the patient, the doctor employed the standard treatment. Evidence of this character is extremely helpful in creating the impression among the jurymen that there is nothing out of the ordinary about the particular injury under consideration and that it is just another case of a broken leg or broken arm, as the case may be. Evidence of this type is particularly helpful in refuting the suggestion or argument advanced by counsel for the plaintiff that the injury in this particular case was an unusual one and that hence the case warrants an unusual verdict.

We turn now to our own witnesses. Many lawyers prefer to use as their expert a man who can testify to the findings in the case from memory without the aid of notes. Under our practice, if a witness is using notes to refresh his recollection, counsel for the opposing side is entitled to examine them (*Richardson vs. Nassau Electric Railway Co.*, 190 A. D. 529). There are times when this will do no harm; at other times it is positively disastrous. Aside from any potential hazard along this line, it sometimes adds to the stature of a witness from a jury standpoint if he shows that his recollection of the case is so clear that he needs no memorandum.

In view of the fact that a concussion of the

brain may be sustained in almost any automobile accident and is one of the most common claims encountered in the trial of liability cases, it is essential to consider how to meet this type of claim. We have found that one of the most effective methods of meeting this contention is to insist upon your examiner making a routine neurological examination along with the general physical examination. Usually the defendant's examiner is a surgeon and cannot qualify as a neurologist. This does not mean, however, that he cannot make a routine neurological examination nor testify as to his findings in this regard. A competent examiner can usually paint a very clear-cut picture to a jury of the fact that the brain and spinal cord comprise the central nervous system and that if the patient's reaction is negative to the various tests performed in a routine neurological examination, such as testing the eyes to see whether they react to light and accommodation, the Babinski test, the Romberg test, the ankle-clonus test, the patellar reflex, the cremasteric reflex, etc., it can then be stated that there is no evidence of organic injury. Some of the more resourceful plaintiff's lawyers who insist upon having a representative of their office present when a physical examination is made by the defendant's examiner have been quick to note the failure to make a routine neurological examination. Any examiner who neglects to include such examination along with a general physical examination leaves himself wide open for cross-examination in cases of claimed brain or head injury. There is nothing that the average plaintiff's lawyer likes any better than to see extra doctors called by the defendant. The presence of such doctors almost invariably adds to the value of the plaintiff's case.

Usually one doctor on the defendant's side of the case is as good as two, and it is unfortunate to be driven to the necessity of having an examination made by a neurologist in a case when such an examination could have been dispensed with if your regular examiner had made his original examination sufficiently comprehensive.

There is one other thought I would like to leave with you before I bring this paper to a conclusion; namely, the question of refraining from putting in any medical proof at all in opposition to the plaintiff's case. If the evidence introduced by the plaintiff cannot be disputed, it is, of course, unnecessary to call any medical witnesses of your own. If the evidence can be disputed, however, it is usually good judgment to do so, particularly where you have a fairly strong defense from a liability standpoint. In such cases, a jury is apt to give a compromise verdict and unless the plaintiff's medical evidence is disputed, a Trial Court is apt to set the verdict aside for inadequacy, upon the theory that if the plaintiff was entitled to a verdict at all, he was entitled, on the undisputed medical evidence, to more than he got.

CONCLUSION

I sum up the subject by stating that in defending a case on medical grounds, there is no substitute for preparation. I repeat the old admonition—don't cross-examine for the sake of cross-examining, and last but by no means least, don't expect perfection in a medical cross-examination; if you can bring the witness around to adopt the substance of your contentions, or even most of them, you have done very well. Pressing for the last detail may undo the whole examination.

The Trend of Decisions in Actions Between Husband and Wife for Personal Injury

By CLARENCE W. HEYL
Peoria, Illinois

UNDER the common law there was a clear and consistent rule as to all rights of action between husband and wife. By this doctrine husband and wife were one, and the husband was the one. The wife had no right to own property, and if she could recover from a third person for a personal tort the proceeds of the recovery immediately inured

to the husband. Therefore, at common law, an action by a wife against her husband for a tort was unknown. The wife remained practically in this status during the period of the strict rule of the common law through the seventeenth century. She had no separate legal existence apart from that of her husband.

During the seventeenth and eighteenth centuries the common law entered upon a period of liberalization by the introduction of equity principles. Since that period the separate entity between husband and wife has been recognized in equity. The relaxation of the common law rule gave to the wife the right to sue her husband to enforce her property rights, and especially those rights arising with respect to her separate estate.

With the adoption of the common law of England it became the universal rule in this country that a husband and wife were one, and she could not bring an action in the law courts against her husband. At common law the wife was obliged to bring the action jointly with her husband as against third persons in all property suits, and also for tort committed against her. Under the unity rule of husband and wife the husband was also liable to third persons for her torts. This inability of one spouse to sue the other at common law for the latter's tort was due not only to procedural difficulties arising from the unity of the husband and wife, but also to the lack of any substantive right. The wife's legal personality upon the marriage merged with that of the husband. The wife was practically the husband's chattel.¹

The gradual entrance of women into the fields of business and the coming of the industrial age changed the status of the wife. This finally resulted in the passage of the Married Women's Acts which undertook to remove the many difficulties inherited from the common law.

These statutes passed by all of the states of the union during the past century may be classified as follows: (a) Those which secure only property and contract interests to the wife. This type did not give the right to sue the husband for a personal tort. (b) Those which grant the wife equal rights with her husband. These affect only her rights against, and her duties to, others than her husband. (c) Those which give to the married woman her property and freedom of contract without interference or control by her husband. No action for personal tort was granted by this statute. (d) Those which provide that a married woman "may sue and be sued." This type gave more substantive rights to a married woman. (e) Those which provide that a married woman "may sue and be sued as though unmarried." This is the type of statute which has been construed by some

courts as giving to the wife the right to sue the husband for a personal tort.

By these statutes generally in force throughout the United States, a married woman, so far as her property rights are concerned, was placed on an equal footing with her husband. She may sue and be sued in her own right the same as before her marriage. Most of the statutes making these broad provisions did not specially stipulate for the right of action between husband and wife for personal tort. Some of the statutes expressly prohibited these tort actions.

The English cases are all in accord, holding that there can be no action for a personal tort between husband and wife. The Married Women's Property Act of England, Section 12, passed by Parliament in 1882, gave the wife all actions against her husband concerning her property rights, but expressly prohibited any right to sue her husband for personal tort.

It is safe to say that the weight of authority in this country is to the effect that the Married Women's Separate Property Acts do not, in the absence of a special provision therefor, permit a married woman to sue her husband for a personal tort. The right of one spouse to maintain an action against the other for personal injury now depends upon the extent to which the Married Women's Acts have abrogated the common law rule. The weight of authority on this question holds that the statutes conferring additional rights on married women, and the right in their own names for redress of wrongs concerning their separate property and personal security, give no right to either spouse to sue the other for personal injury.

One of the leading cases, and it may be said the leading case on this question, is *Thompson vs. Thompson*,² decided by the United States Supreme Court in 1910. The majority opinion was written by Justice Day. This case arose in the District of Columbia, and the action was by the wife against the husband to recover large damages resulting from injury to her person by reason of an assault committed by her husband. The District of Columbia Code contained a statute under the classification heretofore mentioned, namely, Married Women's Property Acts, and in substance provided that "married women shall have power *** to sue separately for the recovery, security or protection of their proper-

¹Blackstone Comm. 442.

²*Thompson vs. Thompson*, 218 U. S., 611, 31 S. Ct. 111.

ty, and for torts committed against them, as fully and freely as if they were unmarried."⁸ The District Court in construing this statute held that the code did not abrogate the common law rule, and denied a recovery. The Court of Appeals affirmed this decision, and on appeal the Supreme Court of the United States affirmed the judgments of the lower courts.

In the opinion of the majority of the court, Justice Day recited the rule at common law and the reason therefor, and clearly pointed out that, under the Married Women's Property Statutes the wife has been permitted to sue for trespass upon her rights and property, and to protect the security of her person against the wrongs and assaults of others, and that these statutes in derogation of the common law are to be strictly construed. He also pointed out that the wife is not left without a remedy for the wrong committed by the husband, namely, assault and battery. She may resort to the criminal courts which, it is to be presumed, will inflict punishment commensurate with the offense committed; that she may sue for divorce or separation and for alimony; that the court, in protecting her rights and awarding relief in such cases, may consider and, so far as possible, redress her wrongs and protect her rights; that she may resort to the chancery court for the protection of her separate property rights. The majority of the court concluded that the statute did not authorize the wife to maintain an action in tort for damages against her husband. There was a vigorous dissent by Justice Harlan, Justice Holmes and Justice Hughes.

Justice Harlan made a very clear and convincing argument in the dissenting opinion, and definitely stated that he believed, under the statutory provisions of the District of Columbia code, that the wife was authorized to maintain the suit. He further said:

"I cannot believe that Congress intended to permit the wife to sue the husband separately, in tort, for the recovery, including damages for the detention of her property, and at the same time deny her the right to sue him separately, for a tort committed against her person."

While the dissenting opinion states that the court is not concerned with the policy, wisdom or justice of the legislation in ques-

tion, that it takes the law as it has been established by competent legislative authority, and that its only function is to declare what the law is, the gist of the opinion clearly shows that the three dissenting justices approved the theory of enlarging the rights of a married woman, and extending to her the absolute right to sue her husband for a personal tort.

Prior to the decision in the Thompson case not a single jurisdiction in the union allowed a recovery for personal injury by one spouse against the other. This decision was widely discussed by the Bar and in the legal periodicals. The great majority of the latter favored the dissent. Four years later the doctrine of the three dissenting justices was made the basis of a direct holding in the case of a wilful tort by the Supreme Court of Connecticut.⁹ This holding was soon followed in other jurisdictions, namely: Oklahoma, New Hampshire, Arkansas, Alabama, South Carolina and North Carolina.¹⁰

The reasoning of the courts sustaining the common law rule was that the Married Women's Acts being in derogation of the common law, are not to be extended beyond their explicit terms, and the reason for not including the right to sue the husband in tort is based upon public policy to preserve the amity of domestic relations, and that in the case of wilful injury, the wife has an adequate remedy by criminal prosecution and by action for divorce or separation.

The considerations influencing the various courts in construing the effect of married women's statutes may be stated as six in number: (1) Many of the cases are decided entirely upon statutory interpretation. This may well be classified as the primary reason or consideration; (2) The question of the effect of divorce upon the common law incidents of marriage; (3) That divorce is a merger, and settles all matters between husband and wife; (4) That the right to sue would open the door for fraud; (5) That the remedies in the criminal and divorce courts are adequate; (6) That tort actions for personal injuries would disrupt and destroy the peace and harmony of the home. This sixth

⁸Brown vs. Brown, 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (NS) 185.

⁹Fielder vs. Fielder, 42 Okla. 124, 140 Pac. 1022. Gilman vs. Gilman, 78 N. H. 4, 95 Atl. 657. Fitzpatrick vs. Owens, 124 Ark. 167; 186 S. W. 832. Johnson vs. Johnson, 201 Ala. 41, 77 So. 335. Prosser vs. Prosser, 114 S. C. 45, 102 S. E. 787. Crowell vs. Crowell, 180 N. C. 516, 105 S. E. 206.

¹⁰Dist. of Columbia Code, 31 Stat. 1184, Mar. 3, 1901.

consideration has been adopted by a majority of the courts denying the right, and the opinions in these cases base the decision upon public policy.

Some courts allowing a recovery in tort actions for personal injuries have reasoned that when one spouse assaults the other, or when the suit is brought, there is little left of the domestic tranquility to be disturbed. Another reason advanced by some of the courts denying the right of action is the danger of domestic collusion. These courts maintain that to permit the action between husband and wife would open the door to fraudulent collusion between them to secure the satisfaction of a judgment from an insurance carrier.

The courts holding to the minority view maintain that the public policy prohibition again the maintenance of the action grew up in the early decisions which, to a large extent, were based upon actions in tort for assault and battery. It is also maintained that where the action is brought by the wife against the husband to recover damages for personal injuries resulting from his negligence, that in most cases the real party defendant is an insurance carrier, and that this would not tend in any way to disturb the domestic tranquility.

One of the first courts to adopt the theory of the dissenting opinion in *Thompson vs. Thompson* was the Supreme Court of Oklahoma in *Fiedler vs. Fiedler*.⁵ In this case the husband was sued by the wife for damages resulting from personal injuries maliciously inflicted upon her by gunshot. The tort was committed during coverture, and the action was brought after a divorce had been granted. The defendant contended that all actions for any wilful or malicious tort of the husband during coverture were merged and extinguished by the decree for divorce. In meeting this issue the court said that the decisions hold that a wife may not recover for a wilful injury as based upon public policy, the reason being that to maintain such an action would tend to invade the holy sanctity of the home and shatter the sacred relations between husband and wife, but that the modern legislatures attempt to break away from the common law rule and place the courts out of hearing of the still lingering echos of barbaric days; that the public policy would not sustain a greater injury by allowing a wife com-

pensation for being disabled for life by the brutal assault of a man with whom she has been unfortunately linked for life, than it would to allow her to go into a criminal court and prosecute him and send him to the penitentiary for such assault, or to go into a divorce court and lay bare each act of their marriage relation in order to obtain alimony; that the divorce courts open the same avenues in order to recover undeserved alimony.

This court further maintained that the legislative intent as expressed in the statute of that state endeavored to shake off the shackles of the common law rule as to the rights of married women. The court construed the Married Womens Statute of that State⁶ as giving the right of action to the wife against the husband for wilful tort. This right is not expressly granted by that statute. The reasoning of the opinion follows the dissenting opinion in *Thompson vs. Thompson, Supra*.

The Connecticut Supreme Court of Errors decided *Brown vs. Brown*⁷ almost concurrently with the case of *Fiedler vs. Fiedler*. The Connecticut court held that, under the statutes preserving to the married woman her rights to own property and transact business in her own name, she may maintain an action in her own name against her husband for assault and false imprisonment, and in the opinion the court said:

"Courts are established and maintained to enforce remedies for every wrong, upon the theory that it is for the public interest that personal differences should thus be adjusted rather than that the parties should be left to settle them according to the law of nature."

It should be noted that each of these cases arose during coverture and as the result of wilful and malicious tort committed by the husband upon the person of the wife. I refer to these two cases as outstanding authorities so far as the minority rule is concerned. The acts committed by the husband forming the basis of either of these cases were probably sufficient to justify a decree for divorce on the ground of extreme and repeated cruelty. These cases were both decided in 1914.

Attempts have been made to distinguish an action for wilful and malicious tort from one

⁵*Fiedler vs. Fiedler*, 42 Okla. 124, 140 Pac. 1022, 52 L. R. A. (NS) 189.

⁶Revised Laws, Oklahoma, 1910, Sec. 3363.

⁷*Brown vs. Brown*, 88 Conn. 42, 89 Atl. 889.

of ordinary negligence. A distinction cannot be made so far as the principle is concerned. Both wilful and negligence torts are breaches of duty, and it is this fact which does control. In 1925 the Connecticut Supreme Court of Errors followed *Brown vs. Brown* in deciding *Bushnell vs. Bushnell*.⁹ In the latter case the plaintiff was suing her husband for damages resulting from personal injury occasioned through his negligent operation of an automobile. It was there charged that the defendant momentarily fell asleep, with the result that the automobile ran off the highway and struck a tree at the side of the road, causing injury to the plaintiff. The defense urged in that case that all of the previous decisions allowing the action between husband and wife were based upon wilful torts, and that these decisions did not warrant the court in holding that in ordinary negligence cases the wife had the right of action. The court brushed aside this contention, and held that under the law of Connecticut, the wife had the right to recover in an action against her husband for a wilful tort or for ordinary negligence. In that case the court said:

"We see no reason now to narrow the scope of the rule we then stated (*Brown vs. Brown*), and in compliance with it we hold that, aside from such cases as may be found to fall within the exception, a wife may maintain an action against her husband for personal injuries due to his negligence."

In 1926 the Supreme Court of Wisconsin in *Wait vs. Pierce*,¹⁰ had before it a case based upon negligence where the wife was suing her husband. The action arose as a result of the negligent operation of an automobile. The Wisconsin court construed the Statute of 1881.¹¹ This act authorized a married woman to maintain an action in her own name for an injury to her person or character the same as if she were a *feme sole*, and provided that the judgment recorded in such action shall be her separate property and estate; and the statute also gave the husband the right to maintain a separate action for any injuries sustained by the wife.

The Wisconsin court based its decision in favor of the maintenance of the action by the

wife solely upon its statutory construction. This decision so far as the reason is concerned, is contrary to the weight of authority on that question. The Court also held that the legislature of the state of Wisconsin, by adopting the Married Woman's Act of 1849 and its various amendments to its final form in 1881, declared the public policy of the state in favor of the right of the wife to bring an action against her husband for negligence or for a wilful tort. The court followed the case of *Brown vs. Brown, Supra*, and recognized the fact that the majority opinion in the United States is contrary to the conclusions reached by that state.

It is interesting to note that the Wisconsin Supreme Court denied the right of the wife to recover in that state in *Buckeye vs. Buckeye*.¹² This was an action brought by a wife against her husband in the courts of Wisconsin for damages resulting from personal injury due to an automobile accident which occurred in the State of Illinois. The Wisconsin court held that the Illinois public policy law governed,¹³ and that the plaintiff did not have a cause of action against her husband, and there said:

"Plaintiff was unmarried at the time of the accident upon which this action is based." At the time of the accident, she acquired a cause of action against the defendant, and was entitled, if she could properly serve him, to prosecute her action in Wisconsin. Pending the trial of the action, she married the defendant. According to the law of Illinois, if it is to govern, the cause of action is extinguished, for the reason that the husband and wife are at law but one person."

In the jurisdictions where the action has been permitted the courts have made no distinction between wilful and negligence torts,

⁹*Buckeye vs. Buckeye*, 203 Wis. 248, 234 N. W. 342 (1931).

¹⁰*Main vs. Main*, 46 Ill. App. 106.

¹¹It should be noted that in all jurisdictions which do not allow a recovery the action is extinguished in case the parties marry after the tort is committed. *a.

*a *Spector vs. Weisman*, 59 App. D. C. 280, 40 F. (2d) 792. *Henneger vs. Lomas*, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848. *Patenaude vs. Patenaude*, 195 Minn. 523, 263 N. W. 546. *Buckeye vs. Buckeye*, 203 Wisc. 248, 234 N. W. 342, (Declaring Illinois law where tort committed.)

⁹*Bushnell vs. Bushnell*, 103 Conn. 583, 131 Atl. 432, 44 A. L. R. 785.

¹⁰*Wait vs. Pierce*, 191 Wisc. 202, 209 N. W. 475, 48 A. L. R. 276.

¹¹Wisconsin Laws of 1881, Ch. 99; Wisconsin Statutes (1925) Sec. 246.07.

and the same rule has been applied as to both. Where the courts have adopted the minority rule in recognizing the right of action, there is no reason for any distinction. Actions for negligence of wilful and wanton torts between husband and wife have been denied or prohibited by Statute in this country in the following jurisdictions. California, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington and West Virginia; also England and Ontario.

Tort actions between spouses have been allowed in the following jurisdictions: Alabama, Arkansas, Colorado, Connecticut, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota and Wisconsin.

In the following jurisdictions no tort actions between husband and wife have arisen; Arizona, Idaho, Kansas, Nevada, New Mexico, Oregon, Utah and Wyoming.

In *Lusk vs. Lusk*,¹⁸ the West Virginia Supreme Court aligned itself in principle with the majority jurisdictions. However, a very interesting distinction is made by that court by denying tort actions between husband and wife and parent and child where no liability insurance is involved, but where liability insurance is involved, then the court will allow recovery.

It should also be noted that since Arkansas took its position with the minority group, the Legislature of that state¹⁹ passed a statute which, in effect, provides that any person related by blood or marriage within the third degree of consanguinity or affinity to the owner or operator, or the husband, widow, legal representatives or heirs of the injured person shall not have a cause of action for personal injury, including death, against the owner or operator of a motor vehicle. The Act does not apply to public carriers. The statute was passed in 1935, and in *Roberson vs. Roberson*,²⁰ the Supreme Court reversed without remanding a judgment for \$5,000.00 in favor of the wife against the husband, and

held that the statute took away the right of action.

*Katzenberg vs. Katzenberg*²¹ was decided by that court in 1931, and the court there held that a married woman may maintain an action against her husband for an injury as the result of his negligence in the management of an automobile in which she was a guest. The court refused, however, in the *Roberson* case to overrule the *Katzenberg* case. Therefore, any action for a tort arising in any manner, except as a result of transportation in a private motor vehicle, may be maintained by the wife against the husband in Arkansas under the *Katzenberg vs. Katzenberg* case.

In 1937 the Legislature of New York, by statute, provided for the action between husband and wife. This will be considered later.

In discussing this subject, consideration should be given to cases involving the question of the right of action between parent and child. There is a definite trend from the rule universally recognized that an unemancipated minor could not recover damages for a tort of the parent. The case of *Minkin vs. Minkin*,²² Pennsylvania, recognizes the right of an unemancipated minor child to recover damages for the wrongful death of one parent from the surviving parent. In that state as late as 1935 tort liability of a parent to a child was denied because of public policy, and the minor's sole remedy was declared to be criminal prosecution of the parent in the event of malice. The *Minkin* case, however, by a four to three decision, sustained the minor's right to sue, and rejected the older public policy doctrine.

The court based its decision primarily upon a statute of Pennsylvania of 1851 as amended in 1855 which provided, in part, "that the persons entitled to recover damages for any injuries causing death shall be the husband, widow, children or parents of the deceased and no other relatives." The court pointed out that there was no exception in the statute depriving the unemancipated minor of the right to sue where the surviving parent was the tortfeasor, and the court refused to read such an exception into the Act, despite the public policy against allowing a child to sue his parent in tort.

Prior to the *Minkin* case, the minor's right

¹⁸*Lusk vs. Lusk*, 113 W. Va. 17, 166 S. E. 538 (1932). (This action was by an unemancipated minor against her father).

¹⁹Acts of Arkansas, 1935, No. 61 and No. 179.

²⁰*Roberson vs. Roberson*, 193 Ark. 669, 101 S. W. (2d) 961 (1937).

²¹*Katzenberg vs. Katzenberg*, 183 Ark. 626, 37 S. W. (2d) 696.

²²*Minkin vs. Minkin*, 336 Pa. 49, 7 A. (2d) 461 (1939).

of recovery was limited to situations in which the parent's insurance carrier was the real defendant, and to situations where the child's injury was received when he was a servant or passenger of the parent. None of these considerations were present in the Minkin case, and hence it presents a clear cut repudiation of the older view, at least in wrongful death cases.

In denying actions between parent and child the courts, following the parent and child non-liability rule, have based their denial on the desirability of preserving parental authority and domestic tranquility, and have almost universally held that an action of that character was against public policy. In 1939 the Court of Appeals of the State of New York, in *Rozell vs. Rozell*,²⁸ had before it a case brought by a boy twelve years of age who was injured while a passenger in an automobile being driven by his sister, who was then sixteen years of age. There was a recovery in the lower court. Both infants were living with their father and mother at the time of the accident, and were being supported by the father and were under his control and direction, and neither had any separate estate. The Court of Appeals sustained the verdict, although in the opinion recognized that, as between a parent and an unemancipated minor child, the weight of authority seems to be that an action will not lie by one against the other for personal injury due to the tortious action of the latter.

It was urged in that case that it was against public policy to permit suits between a brother and a sister involving a tort, and finally it was urged that lack of precedent for such action must control. The language of the court in that opinion may be indicative of the trend in litigation involving tort actions between parent and child and other members of the household where liability insurance is involved.

The Court said that the law is not static; that even though there are no precedents to sustain a recovery in such a case, neither reason nor logic dictates that it must be held that no cause of action exists. The declaration of legal rights arises when social and economic progress demands that such a one be made.

It was noted above that the State of New York was included in the jurisdictions where

an action between husband and wife for tort was not allowed, and it was universally held by the courts of that state (prior to 1937) that such actions were contrary to the public policy of the state. Some interesting decisions came down in recent years. In 1928 the Court of Appeals in *Schubert vs. Schubert Wagon Co.*,²⁹ allowed a married woman to recover for personal injuries from the defendant corporation. The corporation was held liable for the negligence of its servant, the plaintiff's husband, although the plaintiff's husband was held not liable. The court disregarded the contention that the action by the wife was against public policy because the husband was liable over to his principal, the corporation, for any damages that it sustained by reason of his negligence.

In 1932 in *Wadsworth vs. Webster*,³⁰ the court denied a wife the right to recover from the partnership of which her husband, whose negligence had caused the injuries, was a member. Then, in 1935, the Court of Appeals, in *Caplan vs. Caplan*,³¹ definitely settled the question, and held that the partnership was not liable in an action brought by the wife against the partnership of which the husband was a partner.

In 1937 the New York Legislature³² expressly provided that married women may sue their husbands or be sued by their husbands for any wrongful or tortious act resulting in injury to person, property or character. All of the former decisions of New York sustaining the public policy rule are no longer law, and husbands and wives are no longer immune from suits by their spouses for personal torts, and also any partnership of which one spouse may be a member is now liable for all injuries inflicted in the course of the partnership business.

At the same session, the Legislature amended the law relating to standard provisions in automobile policies.³³ This Act provided that such policies cover the named insured and any persons operating or using the automobile with the permission, express or implied, of the named insured. The modification of this Act was as follows:

²⁸*Schubert vs. August Schubert Wagon Co.*, 249 N. Y. 253, 164 N. E. 42, 64 A. L. R. 293.

²⁹*Wadsworth vs. Webster*, 153 Misc. 806, 257 N. Y. Supp. 386.

³⁰*Caplan vs. Caplan*, 268 N. Y. 445, 198 N. E. 23, 101 A. L. R. 1223.

³¹Sec. 57 of Domestic Relations Law.

³²Section 167.

²⁸*Rozell vs. Rozell*, 281 N. Y. 106, 8 N. Y. S. (2d) 901.

"No policy or contract shall be deemed to insure against any liability of any insured because of injuries to his or her spouse or because of injury to or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy."

At the same time the law requiring that bonds or policies issued to the owners of motor vehicles cover the owner and any persons operating with his consent, express or implied, was amended as follows:²⁸

"But this provision shall not be construed as requiring that such a policy include insurance against any liability of the insured, being an individual, for injuries to his or her spouse or for injury to property of his or her spouse."

In January 1940, the Supreme Court, Appellate Division, in *Fuchs vs. London & Lancashire Indemnity Co.*,²⁹ considered a case where the cause of action arose after the enactment of the above statutes.

On January 2, 1938, the plaintiff sustained personal injuries while riding in an automobile operated by Fuchs. The plaintiff brought suit against Fuchs and recovered. Four weeks after the accident the plaintiff and Fuchs married. Three months after the marriage the insurance carrier learned of the relation and disclaimed liability. No one appeared at the trial for the defendant, Fuchs, in the personal injury action, and the plaintiff obtained judgment for \$1500.00.

This action was brought by the plaintiff, Sarah Fuchs, against the insurance carrier. The Fuchs policy contained no express provision insuring against liability for injuries to the spouse of the insured. The court held that if the insured and the plaintiff had been husband and wife at the time the personal injury action was commenced, there could be no recovery on the policy, and that the language of the statute was broad enough to include a case where the parties marry during the pendency of the action. The court denied the right of the plaintiff, Sarah Fuchs, to recover from the insurance carrier, and held that it was the purpose of the Legislature, in enacting these simultaneous statutes,

to authorize personal injury actions between spouses, and at the same time to protect insurance carriers against loss through collusive actions between husband and wife, and that it was the intention to accomplish such object whether the parties were married before or after the commencement of the action, since opportunity for fraud is the same in either case.

There are some interesting conflict of laws questions which arise in tort cases as a result of the passage of these statutes.

If a husband and wife, residents of New York, are traveling by automobile in the State of Connecticut, and the wife is injured by her husband in that state, she has a right of action in Connecticut against her husband. If there is a recovery against the husband, and he fails to discharge the judgment, then two questions would arise, namely: May the wife bring an action in Connecticut to recover against the insurance carrier who has written a policy in New York in which there is no assumption of liability for this action? May the wife return to New York and there recover from the insurance carrier?

There is a division of authority on the question whether a rule of law of a foreign state will govern in a forum which has a contrary rule.

The law of the place of injury usually governs a transitory cause of action unless a strong public policy of the forum forbids the action. In other words, the substantive rights of the parties in tort actions are determined by the law of the place of the tort, and this law will be given effect in any forum selected.³⁰

This general rule is qualified by the equally well established rule that the selected forum will not recognize and give effect to the law of another state if that law is contrary to the positive law of the forum, or contrary to its public policy, or injurious to the state or citizens of the forum.³¹

States adhering to the common law rule denying the right of action as between spouses will on the ground of public policy deny the remedy to a husband or wife for tort committed by the other, even though the act and injury occurred in a jurisdiction allowing tort actions between husband and wife.

The most recent case in which this rule is

²⁸Vehicle and Traffic Law, Sec. 59.

²⁹*Fuchs vs. London & Lancashire Indemnity Co.*, 258 App. Div. 603, 17 N. Y. S. (2d) 338.

³⁰15 C. J. S. Conflict of Laws, Sec. 12, p. 896.

³¹Restatement, Conflict of Laws, Sec. 378.

³²15 C. J. S. Conflict of Laws, Sec. 4, p. 852.

³³*Mertz vs. Mertz*, 271 N. Y. 466, 3 N. E. (2d) 597.

followed is *Kyle vs. Kyle*,²² decided by the Supreme Court of Minnesota in April 1941. In this action the court held that the wife could not recover in Minnesota from the husband for personal injuries received while riding as a passenger in her husband's automobile in Wisconsin, because of the public policy rule of Minnesota, although such action could have been maintained in Wisconsin.^{23 24 25 26}

On the other hand if negligence and injury occur in a jurisdiction denying the right of one spouse to sue the other, the general rule of conflict of laws will be recognized and recovery denied, in any jurisdiction, even though the forum chosen may be one allowing the maintenance of such suits, had the tort been committed there.²⁷

The domicile or residence of the parties to a tort action is immaterial to liability or recovery.²⁸

Under the above well established conflict of laws rules the wife domiciled in New York, injured in Connecticut by her husband could secure a judgment against him in either state, or in any jurisdiction which allows such suits.²⁹

Then the next question to arise is the one dealing with the right to enforce that judgment in any other state.

Let us assume that wife obtains a judgment against husband in a jurisdiction which recognizes this action, and that all the jurisdictional requirements of the forum have been complied with, and that the record discloses such essentials as will entitle it to be recognized as a judgment by the state where rendered. Can this judgment be taken into any other state and there accorded the same effect to which it is entitled in the state where rendered? Following the general rule the answer is in the affirmative.³⁰ That is, the judgment as between the parties may be enforced in the later state.

²²*Kyle vs. Kyle*, 297 N. W. 744, (Apr. 25, 1941).

²³*Kircher vs. Kircher*, 288 Mich. 669, 286 N. W. 120.

²⁴*Mertz vs. Mertz*, 271 N. Y. 466, 3 N. E. (2d) 597, 108 A. L. R. 1120.

²⁵*Poling vs. Poling*, 116 W. Va. 187, 179 S. E. 604.

²⁶Restatement of Conflict of Laws, Sec. 612.

²⁷*Buckeye vs. Buckeye*, 203 Wis. 248, 234 N. W. 342.

²⁸*Forbes vs. Forbes*, 226 Wis. 477, 277 N. W. 112; *Curtis vs. Campbell*, 76 Fed. (2d) 84; certiorari denied, 295 U. S. 737, 55 S. Ct. 649, 79 L. Ed. 1685.

²⁹*Dawson vs. Dawson*, 224 Ala. 13, 138 So. 414.

³⁰*Freeman on Judgments*, Vol. 3 (5th ed. 1925) Secs. 1386-1387.

It is interesting to note that the author of *Freeman on Judgments* says:

"This rule is not altered by the fact that the alleged cause of action would not have supported a judgment in the state where the judgment upon it is sought to be enforced, as where it would have been contrary to the policy of that state, even though the original cause of action arose there and was based upon a gambling transaction prohibited and made a crime by the laws of that state. (Numerous cases cited) * * * A married woman against whom a personal judgment has been obtained in a sister state cannot show that it was based on a note which she signed as surety for her husband, and for which her estate would not have been liable under the law of the forum. (Cases cited.)"³¹

Thus we may conclude that once a wife secures a judgment entitled to recognition in the forum where rendered, she may enforce that judgment against her husband in any forum irrespective of the public policy of that forum. The judgment may not be inquired into except for lack of jurisdiction. This is true, regardless of whether or not we consider the cause of action technically merged in the judgment, under the full faith and credit requirement of the Federal Constitution.

A more difficult question will arise when wife with her judgment obtained against husband in Connecticut tries to enforce it in New York against the husband's insurance carrier, or when she seeks recovery from the insurance carrier in any other jurisdiction. How should the coverage be determined?

It is the general rule of conflict of laws that the law of the place of making or final execution of the contract governs as to the form, and execution, validity, obligation and interpretation of the contract.^{32 33} The law of the state of the situs of the contract becomes as much a part of the contract as if it had been specifically written therein.³⁴

As there is nothing in the standard policy to indicate any intention of the parties that

³¹*Freeman on Judgments*, Vol. 3, Sec. 1399, page 2887.

³²C. J. S. Conflict of Laws, Sec. 11, p. 880.

³³R. C. L. Conflict of Laws, Sec. 54, p. 972.

³⁴*Union Central Life Ins. Co. vs. Pollard*, 94 Va. 146, 26 S. E. 421.

the law of the situs of the tort will control, the law of the place of execution and delivery of the policy will apply. No place of performance is designated in the contract and it hardly seems possible that any contract can be at once subject to interpretation in accordance with the laws of every state within which the assured may drive his car and subject himself to liability.

Therefore, if the wife sues her husband's insurance carrier in New York on his policy, for the satisfaction of the judgment rendered in Connecticut, the New York court would construe the obligation of the contract in accordance with its own laws and deny recovery. The same result would follow in any other state where suit might be instituted. To hold otherwise, the court would in effect be

making a new and different contract for the parties.

In conclusion it may be briefly stated that there is no definite judicial trend interpreting the various Married Women's Acts as abrogating the common law rule. The great weight of authority adheres to the common law rule, and the public policy doctrine.

However, there is a legislative trend to enlarge the scope of personal injury actions between husband and wife, with some concurrent safeguards for the protection of the insurance carriers.

It may, therefore, be predicted that the majority of the jurisdictions in the future will follow the non-abrogation of the common law rule until legislative action provides a modification.

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